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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 LISA CORSON,

4 Plaintiff,

5 v.

16 Civ. 545 (AKH)

6 BROWN HARRIS STEVENS OF THE  
7 HAMPTONS, LLC,

8 Defendant.

Trial

-----x

9 New York, N.Y.  
10 January 24, 2018  
10:49 a.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

15 DUANE MORRIS, LLP  
Attorneys for Plaintiff  
16 BY: STEVEN COWLEY, ESQ.

17 LAW OFFICES OF ANDREW P. SAULITIS P.C.  
Attorneys for Defendant  
18 BY: ANDREW P. SAULITIS, ESQ.

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(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances for the record.

MR. COWLEY: Good morning, your Honor. Steven Cowley.

THE COURT: Speak in a loud voice.

MR. COWLEY: I'll do that, your Honor. Steven Cowley from Duane Morris, your Honor, for the plaintiff Lisa Corson.

THE COURT: And you're with?

MR. COWLEY: Ms. Corson.

THE COURT: Second row?

MR. SAULITIS: Good morning, your Honor. Andrew P. Saulitis, Law Offices of Andrew P. Saulitis, P.C., representing Brown Harris Stevens of the Hamptons, LLC. With me is Erik Davidowicz and Babette Krolik with the organization.

THE COURT: Thank you. You may sit down. And we may begin.

MR. COWLEY: Your Honor, may I ask, do you prefer that I ask my questions from the table or --

THE COURT: From the podium.

MR. COWLEY: Okay. And before we start, I move for admission plaintiff's proposed exhibits that are not objected to.

THE COURT: Do them one at a time as you need them.

MR. COWLEY: I'm sorry?

THE COURT: You do them one at a time as and if you

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1 need them.

2 Shall I repeat one more time?

3 MR. COWLEY: No. I didn't understand at first, your  
4 Honor, but now I do.

5 I call Ms. Corson.

6 THE COURT: Come up here, Ms. Corson.

7 MR. COWLEY: Ms. Corson has a throat lozenge that  
8 she'd like to bring to the stand with her. Is that acceptable,  
9 your Honor?

10 THE COURT: If she'll share with me.

11 MR. COWLEY: Your Honor, I had the binder of proposed  
12 exhibits --

13 THE COURT: Mr. Cowley, we're about to administer an  
14 oath.

15 MR. COWLEY: I'm sorry.

16 THE COURT: There's nothing more serious in a trial.  
17 Please sit down. Pay attention to the oath.

18 (Witness sworn)

19 THE COURT: Mr. Cowley, what is it you want to tell  
20 me?

21 MR. COWLEY: I'm asking permission to put the witness'  
22 copy of the proposed exhibits at the witness table.

23 THE COURT: Has the notebook been given to the  
24 defendant?

25 MR. COWLEY: We exchanged all our lists last week.

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1 THE COURT: That was not my question. If you're  
2 giving something to the witness, then you should give whatever  
3 you're giving to the witness to the opposing counsel.

4 MR. SAULITIS: Is this an extra copy or --

5 MR. COWLEY: We have our own copies.

6 MR. SAULITIS: So thank you for the copy.

7 MR. COWLEY: I'm not giving a copy to you. We  
8 exchanged our exhibits last week by email. He asked me to show  
9 it to you right before I give it to the witness.

10 THE COURT: This will help the order of things. Okay.  
11 I'll give you time each time.

12 MR. SAULITIS: Yes, because --

13 THE COURT: All right. Give it back.

14 MR. COWLEY: Your Honor, I gave all these exhibits --

15 MR. SAULITIS: They were listed, but the physical  
16 exhibits were not provided.

17 THE COURT: I understand. I understand. I  
18 understand. Let's go on. I'll give you time.

19 LISA MICHELLE CORSON,

20 the Plaintiff, having been duly sworn,

21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. COWLEY:

24 Q. Ms. Corson, please introduce yourself to the Court and  
25 state where you live.

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Corson - Direct

1 A. I'm Lisa Michelle Corson. I'm a professional photographer.  
2 I live in Ojai, California.

3 THE COURT: Were you hit by the fire?

4 THE WITNESS: It was surrounding us, yeah, but  
5 fortunately, no, we got lucky.

6 Q. Ms. Corson, how long have you been a professional  
7 photographer?

8 A. Since 2013.

9 Q. Are you the plaintiff in this lawsuit?

10 A. Yes, I am.

11 Q. Prior to becoming a full-time professional photographer in  
12 2013, what did you do?

13 A. I was a photo editor for -- since 1999.

14 Q. And what is the role of a photo editor?

15 A. A photo editor hires photographers and researches images  
16 for -- I worked for publications, for magazines and newspapers.

17 Q. How many publications did you work for as photo editor?

18 A. Several; approximately five.

19 Q. Can you identify any for the Court.

20 A. The magazine New York Magazine, Art+Auction, and The Wall  
21 Street Journal.

22 Q. For how long did you work for the Wall Street Journal as  
23 photo editor?

24 A. I worked at the Wall Street Journal for -- between 2010 and  
25 2013.

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1 Q. And after leaving the Wall Street Journal, did you begin  
2 your career as a full-time photographer?

3 A. I did. That's why I left.

4 Q. Prior to leaving the Wall Street Journal and beginning your  
5 career as a full-time photographer, were you also a  
6 photographer?

7 A. I was.

8 Q. What did you do in that capacity?

9 A. I did personal work, fine artwork on my own and I  
10 photographed stories for a few of the publications that I was  
11 employed as a photo editor, from time to time. It was not my  
12 primary function.

13 Q. Since beginning your career as a full-time photographer in  
14 2013, can you tell the Court how you earn an income.

15 A. I earn an income when a client, usually for me a magazine  
16 or a newspaper, hires me to photograph stories to accompany an  
17 article. I also license those images and other images that I  
18 take to other publications and other companies, as images from  
19 my portfolio, licensed.

20 THE COURT: How do you make money from this?

21 THE WITNESS: How do I make money. I charge a fee to  
22 photograph a story for a client. I charge a fee to license an  
23 existing photo to a client.

24 THE COURT: So they're license fees.

25 THE WITNESS: License fees, yes.

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1 THE COURT: If you do a photographic shoot for a  
2 particular item of media, can you use that same photograph  
3 again?

4 THE WITNESS: I can. Sometimes with restrictions on  
5 time, but I retain all of my copyrights for the assignments  
6 that I make.

7 BY MR. COWLEY:

8 Q. Can you identify for the Court some of your clients that  
9 hire you to photograph images for them.

10 A. Yes. The Wall Street Journal, Sunset Magazine, Time Inc.,  
11 Los Angeles Magazine, a number of other publications.

12 Q. For your publishing clients that hire you as the  
13 photographer, can you please describe to the Court what kind of  
14 fees you charge them.

15 A. There are a couple of ways that the magazines pay  
16 photographers. Sometimes it's a day rate plus expenses,  
17 sometimes it's a flat project fee, and each publication is  
18 different, and they typically set those terms and they  
19 typically have a fee that they propose to me and I agree or  
20 not, but it's typically not flexible.

21 THE COURT: Specifically not what?

22 THE WITNESS: It's typically not flexible. The fee --

23 THE COURT: I understand. Okay.

24 THE WITNESS: Okay.

25 Q. You mentioned to the Court in your answer a moment ago that

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1 you retain the copyrights that you're licensing. Please  
2 explain what you mean by that.

3 A. I register my copyrights, either before publication or  
4 within three months of publication. I register those  
5 copyrights with the U.S. Copyright Office. I typically have a  
6 contract with my client, with the publication, that states that  
7 I retain the copyright to my images.

8 Q. You mentioned a second type of license fee for works in  
9 your portfolio. Can you please describe for the Court the  
10 types of clients who pay for such licenses.

11 A. Some of those clients are also publications, newspapers and  
12 magazines; some of those clients are various companies, tourism  
13 bureaus, other companies, companies that maybe make a product  
14 that's featured in a photograph, if it's a home shoot or a  
15 developer, if I photograph a property that the developer has a  
16 stake in.

17 Q. And how is it that you make people aware of your  
18 photographs that are available for license from your portfolio?

19 A. Some people, often they -- they see the photograph in a  
20 publication. If I photograph something for a newspaper or  
21 magazine and it's published with my name, then it's easy to  
22 find me. Clients will look up my name or they'll contact the  
23 publication to ask how to contact me.

24 Q. Do you put your photographs or any photographs from your  
25 portfolio out for publication so that people can see them?



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1 A. I do. I have images on my portfolio website, and my  
2 contact information is there. People can contact me looking to  
3 license any of those.

4 I also have a stock agency that I work with. They are  
5 called Gallery Stock. They syndicate some of my photographs.

6 And I have another website that's called Photo  
7 Shelter. It's with a service called Photo Shelter, where I  
8 post certain images to, so that people can find them and  
9 contact me to license them.

10 Q. When you are contacted by people looking to use one of your  
11 photographs, how is it that you arrive at compensation for that  
12 permissive use, if you're going to give it?

13 A. The factors include what type of company it is, is it  
14 editorial use, is it commercial use, and what is the form,  
15 where will the image appear, will it appear on a website, will  
16 it appear in a brochure, an advertisement, what the duration of  
17 time that the photograph is used for, is it used for one month  
18 or one year or forever. There are a lot of different factors.  
19 The size that it's used.

20 Q. Who makes the decision as to the price that should be  
21 charged for the license based on the particular fact of the  
22 transaction?

23 A. Sometimes a client will come to me and say, I have this  
24 much money to use this one picture. Do you agree or not? And  
25 I say yes or I say, you know -- I negotiate, you know, for more

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1 money if I feel it's worth more money. Sometimes clients come  
2 to me and ask, how much would you charge for this use or for  
3 this job?

4 Q. Have you turned down offers for licensing photos from your  
5 portfolio because of the price offer?

6 A. Yes, a number of times.

7 Q. And have you successfully negotiated licensing fees on  
8 occasions so that somebody did license a photo for their use  
9 from your portfolio?

10 A. Yes, a number of times.

11 Q. Do you charge the -- strike the question I started.

12 The Court a little while ago asked you, if you do a  
13 photograph for a publication, whether you can also license that  
14 same photograph again, and you answered the Court that you  
15 could because you retained your copyright. Following up on  
16 that question, in those circumstances, do you charge the  
17 license fee to the client who wants to use it a second time the  
18 same amount that the first publication gave you?

19 A. No. Those numbers are unrelated.

20 Q. Please explain why that is.

21 A. Well, when I -- when a magazine or newspaper hires me to  
22 photograph a story, they -- there's a certain amount of  
23 publicity that I myself get from being in a prestigious  
24 publication, in a national publication that has name  
25 recognition, and my name being out there in a publication with

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1 my images, especially if they're large and it's an important  
2 large story, that directs new clients to me and that's a way  
3 that I find new clients.

4 Q. And you say that getting your photographs published by a  
5 well-known publication gets new clients to you. First of all,  
6 how do they know you took the photograph?

7 A. My name appears on the page with the photograph.

8 Q. Is that photographer's credit?

9 A. It is.

10 Q. And how is it that you know that on occasion some customers  
11 have found you that way, asked to license that same photograph?

12 A. Because they told me specifically that they found this  
13 picture in this publication that I took and they are interested  
14 in licensing it.

15 Q. You've stated earlier that in deciding on the license fee  
16 to charge for such usage, a number of factors are considered.  
17 In establishing your fee, what weight do you give and how does  
18 it affect the price you'll charge if a user says, I want to use  
19 your photograph on my website but give you no credit  
20 whatsoever?

21 A. That is definitely something that increases the fee  
22 significantly, substantially. It's not something that I agree  
23 to. I would -- actually do not -- I cannot think of an  
24 instance where I've agreed to that. It's not out of the  
25 question, but it -- the fee would increase substantially,

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1 because the end use doesn't -- if it doesn't have my name on  
2 it, it doesn't further my -- my business in any way.

3 Q. Approximately what percentage of your overall income of  
4 your photography business do you earn from the users who seek  
5 to license photographs from your portfolio after they've  
6 already been published?

7 A. About a third of my income.

8 Q. In your binder in front of you, I'm going to ask you to  
9 turn to the second tab, Exhibit No. 2, Plaintiff's Exhibit  
10 No. 2. What is that document?

11 A. This is my freelance agreement with The Wall Street  
12 Journal.

13 Q. When did you enter into that agreement?

14 A. March 27, 2013.

15 Q. What was the purpose of, as you understood it, of entering  
16 that agreement with The Wall Street Journal?

17 A. Well, that was right before I left The Wall Street Journal  
18 as a staff photo editor to start my photography career, and  
19 they asked me to sign this agreement so that they could contact  
20 me in the future after I moved to California to photograph  
21 assignments for them.

22 Q. Was this agreement, was that specific to any particular  
23 photography assignment?

24 A. No. It's a standing agreement for every assignment that I  
25 would shoot for them.

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1 Q. Since March 2013 have you done photography assignments for  
2 The Wall Street Journal?

3 A. I've done over 20 assignments.

4 Q. And how have those assignments come about?

5 A. A photo editor -- there are a few that I work with. The  
6 photo editor would contact me and ask if I'm interested in a  
7 certain story and available on a certain date or a range of  
8 dates, tell me what the fee is, and what type of photos they're  
9 looking for, and ask if I'm interested.

10 MR. COWLEY: First of all, your Honor, I'd move for  
11 admission of Plaintiff's Exhibit No. 2.

12 MR. SAULITIS: No objection.

13 THE COURT: Received.

14 (Plaintiff's Exhibit 2 received in evidence)

15 THE COURT: There's no indication of amount, is there?

16 THE WITNESS: No, your Honor.

17 BY MR. COWLEY:

18 Q. To follow up on the judge's question, why, in the first  
19 agreement you signed with The Wall Street Journal in 2013, is  
20 there not a reference to a specific amount?

21 THE COURT: Says so in the agreement itself. The fee  
22 will be set each time, each time a photograph is submitted.

23 THE WITNESS: Yes.

24 Q. In the over 20 instances of taking on photography  
25 assignments from The Wall Street Journal, have you negotiated

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1 specific fees for each one of those assignments?

2 A. Each assignment, they will tell me what the fee is. It  
3 varies. Mainly, if an assignment is intended to run on the  
4 cover of the section -- in the case of the home stories that I  
5 shoot, it's the mansion section. If it's intended to run on  
6 the cover, they typically have a little bit more budget and the  
7 fee is higher. If it's intended to be a smaller story, they  
8 have what is their standard day rate across the paper. It's a  
9 little bit lower.

10 Q. Is that a similar relationship with the other publications  
11 that you work for doing photography assignments?

12 A. It is. Some publications pay more for say a feature story  
13 that runs across 10 pages versus a smaller story that just runs  
14 on one page.

15 Q. I asked you a little while ago about the few different  
16 types of revenue streams -- the journals that pay you to take  
17 photographs or people who license from your portfolio. Which  
18 one of those fees, which one of the per-assignment charges tend  
19 to be higher, which tends to be lower?

20 A. Typically licensing an existing image is a -- has a higher  
21 fee. You know what you're getting. You know that it's the  
22 exact image that you want to use. When you hire a photographer  
23 for an assignment, there's a certain amount of uncertainty.  
24 You don't know what the weather will be like, what the exact  
25 situation will be like, and what types of images you will get

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1 out of that assignment.

2 Q. In your experience licensing photographs from your  
3 portfolio that have already been used before to a new user,  
4 what's the range of fees you charge for a photograph license of  
5 that nature?

6 A. If there's likely -- based on where the image is used and  
7 who is using it, I've charged as much as \$5,000 for a single  
8 image and -- to a commercial user and -- but the range is wide.

9  
10 Q. Can you explain what you mean by commercial user. What are  
11 you distinguishing?

12 A. Well, a commercial -- the distinctions between the usage  
13 are typically commercial use or editorial use. Editorial use  
14 is news. Editorial use is generally in a magazine or newspaper  
15 or perhaps a newsy website, whereas commercial use is used by a  
16 company that's meant to just specifically drive business to  
17 that company.

18 Q. Which of the two types of uses did the defendant make of  
19 your photograph at issue in this case?

20 A. That was commercial use.

21 Q. Looking at Exhibit 2 again, I draw your attention to the  
22 second number. It ends with the sentence, "You further agree  
23 that Dow Jones may grant third parties a license to republish  
24 the photographs in connection with the article or other content  
25 with which the photographs initially appear in WSJ."

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1 First of all, who did you understand was referred to  
2 as Dow Jones and WSJ?

3 A. Dow Jones is the parent company of The Wall Street Journal,  
4 which is referred to as WSJ.

5 Q. What did you understand you were agreeing to in that  
6 sentence when you said that Dow Jones could give permission to  
7 others to use your photographs that they were --

8 THE COURT: I think the agreement is self-explanatory.  
9 What do we need this for?

10 MR. COWLEY: Well, your Honor, an issue has been made  
11 as to whether or not this could have been given away for free.

12 THE COURT: If they wanted to, they could have.

13 MR. COWLEY: That's not the witness' understanding.  
14 That's what I'd like to explain to the Court.

15 THE COURT: Well, go ahead.

16 BY MR. COWLEY:

17 Q. Ms. Corson, what did you understand you were agreeing to in  
18 that sentence of Section 3?

19 A. Well, I have a very firm understanding of what their  
20 intention was with this sentence. When I was a photo editor,  
21 it was part of my job -- when I was a photo editor at The Wall  
22 Street Journal, it was part of my job to ask photographers to  
23 sign this agreement and to explain any, you know, question --  
24 to answer any questions that they had about it and to explain  
25 any parts of it, and my -- my boss at the time, the photo



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1 director of The Wall Street Journal, explained to me that this  
2 clause allowed The Wall Street Journal to use social media  
3 sharing tools on their website, the -- there's a button you can  
4 click to post a little headline, a small image to Facebook and  
5 also to Twitter, you can email the article to a friend, and The  
6 Wall Street Journal allows their subscribers to use these tools  
7 to share the article in limited ways, which helps drive  
8 business to The Wall Street Journal and helps them increase  
9 their subscribers, and he specifically told me that -- that  
10 this sentence did not mean that The Wall Street Journal was  
11 going to let everybody use the pictures for free or to  
12 license -- to sell the pictures to anybody else to use.

13 MR. SAULITIS: Move to strike, your Honor, on the  
14 grounds of hearsay and also parallel evidence.

15 THE COURT: Granted.

16 MR. COWLEY: Your Honor --

17 THE COURT: Testimony stricken. Go on to the next  
18 question.

19 BY MR. COWLEY:

20 Q. Ms. Corson, in negotiating your freelance agreement with  
21 other photographers on behalf of The Wall Street Journal, did  
22 you ever tell any photographer that The Wall Street Journal  
23 could give their photographs away to some other user for free?

24 A. I told them that The Wall Street Journal did not intend to  
25 license their pictures to other people, other companies, did

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1 not intend to become -- to act as a stock agency and sell  
2 pictures to anybody else. I told --

3 MR. SAULITIS: Objection. Same objection.

4 THE COURT: Overruled.

5 Q. Based on your experience working as a photo editor for The  
6 Wall Street Journal, did you have experience from time to time  
7 with the Wall Street --

8 THE COURT: The document says they could. It stands  
9 to reason that they're doing things for a fee. They're a  
10 profit-making company. A profit-making company doesn't give  
11 things away and thus there's no advantage for it to give it  
12 away. Why don't we move on to another subject.

13 But they have the right to give it away. If there's  
14 an advantage to The Wall Street Journal of giving it away, they  
15 give it away.

16 BY MR. COWLEY:

17 Q. Ms. Corson, in your experience working with The Wall Street  
18 Journal as photo editor and working for them since you left as  
19 a freelance photographer, has The Wall Street Journal ever  
20 given permission to any third party to use one of your  
21 photographs without you giving permission and obtaining the  
22 licensing?

23 MR. SAULITIS: Objection.

24 THE COURT: Overruled.

25 A. Not to my knowledge. They have --

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1 THE COURT: You've answered the question.

2 Q. Have you ever experienced the opposite? In other words,  
3 have you ever had occasion to experience some third party  
4 wanting to use one of your photographs that appeared in the  
5 Wall Street Journal?

6 A. Yes, I have.

7 Q. And in that circumstance what did The Wall Street Journal  
8 do?

9 A. My photo editor emailed me and told me that -- there is one  
10 instance where a magazine, Sabato, in Belgium, licensed text, a  
11 story that ran in The Wall Street Journal. They licensed the  
12 text from The Wall Street Journal and paid The Wall Street  
13 Journal a fee, and they were interested in using my photographs  
14 in connection with that article, and that they would be  
15 contacting me to negotiate usage fees for those images.

16 MR. SAULITIS: Objection. Hearsay.

17 THE COURT: Sustained.

18 MR. COWLEY: Your Honor, I'm not admitting it for the  
19 truth as much as I'm admitting it for her practice.

20 THE COURT: You're admitting it for the truth. That's  
21 what you want.

22 BY MR. COWLEY:

23 Q. Did the third party contact you --

24 THE COURT: You've established this never happened.  
25 So let's move on, please.

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1 Q. Ms. Corson, I'd like to make sure the record is clear.  
2 Earlier the Court pointed out that The Wall Street Journal  
3 presumably charges a fee. You just mentioned The Wall Street  
4 Journal charging a fee for text. Please explain to the Court  
5 what you understood The Wall Street Journal charged users who  
6 wanted to take a Wall Street Journal article --

7 THE COURT: What was the typical fee?

8 THE WITNESS: I'm not sure across the board. I looked  
9 up an article on their --

10 THE COURT: You were the photo editor.

11 THE WITNESS: I was the photo editor.

12 THE COURT: When you were the photo editor, did you  
13 know the prices of the licensing that Wall Street Journal did?

14 THE WITNESS: Not for the text.

15 THE COURT: But for photographs.

16 THE WITNESS: For photographs --

17 THE COURT: What was the typical pricing?

18 THE WITNESS: What The Wall Street Journal would pay a  
19 photographer to run in The Wall Street Journal?

20 THE COURT: That's one thing.

21 THE WITNESS: It ranged from -- for an existing photo,  
22 not an assignment, but for an existing single photo, it would  
23 range from \$100 to perhaps \$600 per image.

24 THE COURT: And what were the variables?

25 THE WITNESS: The size of the image. There are kind

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1 of standard sizes that determine different rates.

2 THE COURT: Anything else?

3 THE WITNESS: The placement of the image, whether it's  
4 on the cover of a section, the cover of the newspaper, the full  
5 newspaper, or an inside -- on subsequent pages.

6 THE COURT: Okay.

7 BY MR. COWLEY:

8 Q. Did you ever experience, in your time working as photo  
9 editor for The Wall Street Journal, The Wall Street Journal  
10 agreeing to license a photograph that it had acquired from a  
11 photographer to some third-party user who wanted to use it?

12 A. No.

13 Q. Can anyone read The Wall Street Journal articles and photos  
14 that you have given and licensed to The Wall Street Journal  
15 along with these articles online for free?

16 A. Not to my knowledge.

17 Q. What do users that want to read The Wall Street Journal  
18 article and see your photograph online, what do they have to  
19 do?

20 A. They have to subscribe to The Wall Street Journal and log  
21 in to the site to see the full article. They can typically see  
22 a small portion, a headline, and a little bit of text at the  
23 beginning, and then it blocks the rest of it and asks them to  
24 log in or subscribe.

25 Q. I'm going to ask you now to turn to Exhibit 3.

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1           What is that document?

2           A. This is the online version of the article that I  
3           photographed the photograph in question for; ran on WSJ.com.

4           Q. So when you say it's the online version, whose version?

5           A. The Wall Street Journal's.

6           Q. Do you see your photograph -- do you see a photograph that  
7           you took for The Wall Street Journal in Exhibit 3?

8           A. Yes.

9           Q. Where?

10          A. On the second page of the exhibit.

11                 MR. COWLEY: Your Honor, I move for admission of  
12          Plaintiff's Exhibit 3.

13                 MR. SAULITIS: May I see a copy, please.

14                 THE COURT: Don't you have it?

15                 MR. SAULITIS: No. It wasn't provided.

16                 THE COURT: It wasn't provided?

17                 MR. COWLEY: Your Honor, we provided everything.

18                 MR. SAULITIS: It was in a list, but --

19                 THE COURT: By having a list, you have access to the  
20          photographs, right?

21                 MR. SAULITIS: Not quite, because it wasn't one of the  
22          discovery documents. I don't think it will be a problem, but I  
23          just wanted to make sure that we were talking about the same --

24                 MR. COWLEY: Your Honor, defense counsel asked me to  
25          use this exhibit and not the exhibit we proposed because we

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1 proposed the printed exhibit and he said we had to use the  
2 online version. I told him we did that, and he said fine.

3 MR. SAULITIS: No objection. It's not a problem. I  
4 just wanted to --

5 THE COURT: The exhibit is received.

6 (Plaintiff's Exhibit 3 received in evidence)

7 THE COURT: This is your photograph.

8 THE WITNESS: Yes, Judge.

9 BY MR. COWLEY:

10 Q. How did this assignment come about?

11 A. My photo editor emailed me and gave me a brief description  
12 of the story, told me what it was and what the fee was, and  
13 asked if I was interested and available on a date or date  
14 range. I don't recall.

15 Q. Just generally speaking, what did you understand the story  
16 was in the photograph?

17 A. The story was about luxury spec homes that are built  
18 without a buyer.

19 Q. And what did you do to accomplish that photography  
20 assignment?

21 A. I spent an afternoon at the house with the -- the people  
22 who designed and built the home, and I photographed all of the  
23 primary rooms in the home, I photographed the grounds, the  
24 exterior of the home, special luxury features of the home; I  
25 made a number of images there.

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1 Q. And then did you do anything else before submitting  
2 photographs to The Wall Street Journal?

3 A. I processed the images.

4 Q. What did that entail?

5 A. I take what is basically a digital negative that's flat  
6 visually, colorwise, and contrastwise, and I make adjustments  
7 in a program called Adobe Lightroom and I add kind of my style  
8 to the images and just adjust them and make them look their  
9 best.

10 Q. And then what did you do with the photographs?

11 A. I sent a selection of those photographs, the ones I deemed  
12 to be the best, to The Wall Street Journal via their FTP  
13 service.

14 Q. When you submitted photographs to the Wall Street Journal  
15 on the occasion of this assignment, did you agree to transfer  
16 your copyrights of the photographs to The Wall Street Journal?

17 A. No, I did not.

18 Q. What did you do with regard to your copyrights in those  
19 photographs?

20 A. I registered the copyrights to all of the images that I  
21 sent to The Wall Street Journal with the U.S. Copyright Office  
22 before they were published.

23 Q. If I could ask you to look at Exhibit No. 4 in the witness  
24 binder.

25 THE COURT: How much did you charge for this



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1 photograph shoot?

2 THE WITNESS: I was paid for the assignment, a flat  
3 fee.

4 THE COURT: How much?

5 THE WITNESS: \$600 for the photo assignment. I was  
6 paid \$100 to shoot video additionally, and I was paid a nominal  
7 amount of expenses.

8 THE COURT: \$600 for the whole shoot plus?

9 THE WITNESS: \$100 to shoot video.

10 THE COURT: Anything else?

11 THE WITNESS: I think they paid for the mileage and  
12 maybe the meals.

13 THE COURT: They reimbursed you for mileage and meals.

14 THE WITNESS: Yes.

15 THE COURT: So under a thousand dollars to take care  
16 of everything.

17 THE WITNESS: Yes.

18 BY MR. COWLEY:

19 Q. Ms. Corson, I'm going to ask you to look at Tab 4 of  
20 plaintiff's proposed Exhibit 4. What is that document?

21 A. That is the image that I took. It's a screenshot of the  
22 image of part of a slide show on The Wall Street Journal's  
23 website.

24 Q. I'm going to ask you to look back at Exhibit 3. When you  
25 saw your photograph in the online article, would you explain to

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1 the Court what you mean by slide show.

2 A. Yes. So on The Wall Street Journal's website, they often  
3 have what is called a slide show, which is a way to show  
4 additional images within a small space on the website.

5 THE COURT: You can click on a spot and one picture  
6 after another in sequence will be shown, right?

7 THE WITNESS: Yes, your Honor.

8 THE COURT: All right.

9 Q. And when you open the article to read at a given time,  
10 would the same article appear any time you opened the article?

11 A. Not necessarily. It would probably often default to the  
12 first image unless you opened the article multiple times, and  
13 I'm not sure how the computer caches what you've looked at  
14 before. It might open it to something in the middle of the  
15 slide show.

16 Q. To see all of them, what would you have to do?

17 A. You would have to click through each individual picture.

18 Q. And which number in the slide show was the photograph at  
19 issue in this case?

20 A. It's No. 14.

21 Q. And is this the photograph that is the subject of this  
22 lawsuit?

23 A. Yes, it is.

24 MR. COWLEY: Your Honor, I move for admission of  
25 Plaintiff's Exhibit 4.

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1 MR. SAULITIS: No objection.

2 THE COURT: Received.

3 (Plaintiff's Exhibit 4 received in evidence)

4 THE COURT: Did you get anything more for that  
5 particular photograph --

6 THE WITNESS: No, I did not.

7 THE COURT: -- than was covered for the \$600 for the  
8 shoot?

9 THE WITNESS: No, I did not.

10 THE COURT: It was not.

11 THE WITNESS: It was included in the flat fee for the  
12 assignment. I did not receive additional --

13 THE COURT: \$600.

14 THE WITNESS: Yes.

15 THE COURT: For the whole shoot.

16 THE WITNESS: Yes.

17 THE COURT: And nothing extra for this particular  
18 photograph.

19 THE WITNESS: No.

20 BY MR. COWLEY:

21 Q. You mentioned earlier --

22 THE COURT: You don't make a lot of money as a  
23 photographer, do you?

24 THE WITNESS: You make a lot of money if you start  
25 doing commercial work and in licensing existing images, because

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1 you can relicense them over the years.

2 THE COURT: So you need a large inventory.

3 THE WITNESS: You do.

4 BY MR. COWLEY:

5 Q. Ms. Corson, you said earlier, in response to my question  
6 about what you charge for the licensing of individual  
7 photographs for a second use from your portfolio, you said that  
8 you've charged up to \$5,000. Was that also a photograph that  
9 was taken for a publication?

10 A. No, it was not.

11 Q. Was that taken as part of a group of photographs?

12 A. That was taken on my own, not as part of an assignment. It  
13 was part of a group of photographs in the sense that I was out  
14 photographing for the day on my own with the intention of  
15 hopefully being able to license those images to someone.

16 Q. On other occasions have you licensed photographs,  
17 individual photographs that were taken as part of a group by a  
18 publication's assignment?

19 A. Yes, I have.

20 Q. And in those instances have your licenses of the individual  
21 photographs been for more than you were paid for the entire  
22 photography assignment?

23 A. Yes, I have.

24 Q. I'll ask you now --

25 THE COURT: Was the house photograph, Exhibit 3,

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1 licensed by anyone else?

2 THE WITNESS: No, it was not, your Honor.

3 THE COURT: You had it offered for license, right?

4 THE WITNESS: I have it on my portfolio website.

5 THE COURT: If I called you up and I said, I'd like to  
6 have a picture of a beautiful house, that one might fit, what  
7 would you charge me?

8 THE WITNESS: Depends on what you'd want to do with  
9 that.

10 THE COURT: Hang it up in my foyer.

11 THE WITNESS: I would, for -- so you'd be interested  
12 in a print of that image?

13 THE COURT: Yes.

14 THE WITNESS: It depends on the size.

15 THE COURT: 11 x 14.

16 THE WITNESS: I don't sell a lot of fine art prints.  
17 I don't know exactly. I would do research.

18 THE COURT: You have no experience for that.

19 THE WITNESS: I don't so much. I know kind of --

20 THE COURT: What would I call you up for?

21 THE WITNESS: You could call me up for that. It would  
22 just take me a bit of research to figure out what I would want  
23 to charge for it.

24 THE COURT: And how would you research it?

25 THE WITNESS: I would look at different types of

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1 prints and see how much someone was going to charge me to  
2 actually print it, because I wouldn't be printing it. I would  
3 talk to you and find out, are you an art collector or do you  
4 just want something to hang on your wall, do you want it to be  
5 archival? Archival print, you want it to last at least a  
6 hundred years. Or are you going to just put it in your office  
7 cubby. I would look at other photographers --

8 THE COURT: Let's suppose I want to have a print so I  
9 can show the designer of a house that's being built for me what  
10 design I might like. What would you charge? Any experience?

11 THE WITNESS: That's complicated, because that's then  
12 commercial work instead of a fine art print, so that's like  
13 including something in a brochure or in marketing.

14 THE COURT: Okay. So how much?

15 THE WITNESS: I don't have so much experience.

16 THE COURT: What do you sell these licenses for?

17 THE WITNESS: I license a lot of images to other  
18 publications.

19 THE COURT: What do they pay you, in order of  
20 magnitude? A hundred dollars a photograph?

21 THE WITNESS: On the low end, that's the minimum.

22 THE COURT: \$600 on the high end?

23 THE WITNESS: \$2,000 on the high end.

24 THE COURT: What's the variable? What determines  
25 whether it's a hundred dollars or \$2,000?

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1 THE WITNESS: It depends the circulation of the  
2 publication, it depends on the size of the image --

3 THE COURT: Well, it can be blown up to any size,  
4 can't it?

5 THE WITNESS: Depends on the size the publication  
6 intends to run it. Things are usually divided into spot use,  
7 which is like a thumbnail, an eighth of a page, a quarter of a  
8 page, a third of a page, a half of a page, a full page, and  
9 then a cover image is more, and then sometimes something goes  
10 across two pages. That's more.

11 THE COURT: What is typical?

12 THE WITNESS: I'm sorry, your Honor?

13 THE COURT: What's typical?

14 THE WITNESS: What's typical?

15 THE COURT: Yeah.

16 THE WITNESS: Typical is 1 to \$3,000 for a cover,  
17 typical is a thousand to 350 for a full page.

18 THE COURT: A thousand to 350 or a thousand to 3,500?

19 THE WITNESS: 350 to a thousand. \$350 to a thousand  
20 dollars for a full-page picture.

21 THE COURT: Okay. Go on.

22 BY MR. COWLEY:

23 Q. What about online? You were talking about publications in  
24 the print of a picture. What about online use? Have you  
25 experienced licensing for commercial use for people to put it

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1 on their website, on their businesses?

2 A. I have typically, in -- in connection with -- or typically  
3 not solely online, typically in connection with other -- other  
4 uses, social media, which I guess is typically online but is  
5 kind of billed out as a separate type of usage. Social media  
6 is different than a -- than a company's website. Whether it's  
7 a promotional website or a blog, that's a commercial website.  
8 And then brochures. People typically want to do multiple  
9 things with the images, not just necessarily put it on their  
10 website.

11 Q. Social media site, is that something like Facebook or  
12 LinkedIn?

13 A. Yes, it is.

14 Q. So someone might have their own page but someone else can  
15 put it on, right?

16 A. Yes.

17 Q. Put it online?

18 A. It's referred to as social media in terms of licensing.

19 Q. So for commercial use, for someone to be able to use it on  
20 their own website to sell the services, put it on social media  
21 to advertise or make the services known, how does that affect  
22 the price you charge compared to print photographs?

23 A. Well, a commercial -- a commercial website, a commercial  
24 use of -- use on a commercial website is going to be more  
25 than -- than use in a publication, whether it's a print



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1 publication or an online publication. If you're talking in  
2 terms of magazines and newspapers of editorial publications,  
3 the print use is typically more expensive and the online use is  
4 added on.

5 THE COURT: So if you go on to another website, it's  
6 some price below a hundred dollars to \$8,000, which is the  
7 range you gave me for licensing.

8 THE WITNESS: I'm sorry. I'm a little bit lost, your  
9 Honor.

10 THE COURT: If you're charging you said a thousand  
11 dollars to \$3,000 for a cover page --

12 THE WITNESS: Yes.

13 THE COURT: -- and \$350 to a thousand dollars for a  
14 full page, what happens if you are licensing to someone running  
15 a social media site -- for example, Slate magazine?

16 THE WITNESS: If they wanted to additionally use it on  
17 their social media or solely use it on social media?

18 THE COURT: I don't know. Give me a range.

19 THE WITNESS: A range for --

20 THE COURT: Have you so licensed anything that way?

21 THE WITNESS: Most of what I sell goes in print and  
22 then it -- and then the web usage is kind of tacked on as an  
23 additional fee, and it's a smaller fee than the print usage,  
24 because it's kind of tacked on to the print usage. It's kind  
25 of like bundling the -- bundling the fee and giving --

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1 THE COURT: I get the picture. Thanks.

2 BY MR. COWLEY:

3 Q. Have you charged people who are purely commercial users,  
4 selling their own goods and services but they're not  
5 publications, they're not journals or social media sites -- do  
6 you charge them more?

7 A. Yes, I do.

8 Q. What's the range that you charge for purely commercial use  
9 of your photos to advertise other goods and services?

10 A. It varies greatly depending on what the usage is, what the  
11 scope of the usage is. Per image, start, you know -- I've  
12 licensed things for as much as \$5,000 and as low as a thousand  
13 dollars, as low as maybe \$500 if it's a fair number of images  
14 being used. Sometimes when you license 20 images to someone  
15 versus licensing one, you might license the first few for a  
16 higher amount and then reduce the fee as they -- as they  
17 license -- as they license more images, because there are so  
18 many of them; you're kind of giving them a discount.

19 Q. Are you saying that if someone wants to use just a single  
20 image, they pay more for that on average than if they licensed  
21 a lot?

22 A. Yes, they do.

23 Q. I'm going to ask you to look at Tab 1, Plaintiff's Proposed  
24 Exhibit 1. What is that document?

25 A. This is my certificate of registration from the U.S.

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1 Copyright Office for the images, including the image of the  
2 home in question.

3 Q. So this includes the image that was shown in Exhibit 4?

4 A. Yes, it does.

5 THE COURT: The house or pool or both?

6 MR. COWLEY: Plaintiff's Exhibit 4 is the one  
7 photograph of the outdoor pool.

8 THE COURT: Yes. So is it the registration for the  
9 pool?

10 THE WITNESS: It's the registration for the pool and  
11 other images from the assignment that you don't see in these  
12 exhibits.

13 THE COURT: More than one registration?

14 THE WITNESS: Yes, your Honor.

15 BY MR. COWLEY:

16 Q. What date did you apply for the registration covering the  
17 photographs you gave to The Wall Street Journal?

18 A. March 18, 2015.

19 Q. Why did you apply for registration?

20 A. Because I had a number of images that were going to be  
21 published soon and I wanted to register them before they were  
22 published.

23 Q. Why?

24 A. Because I wanted to have the full protection of the law for  
25 the images, against infringement. If I published all the

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1 images, before publication, if at all possible, I wanted to  
2 have them all registered with the U.S. Copyright Office.

3 MR. COWLEY: Your Honor, I move for admission of  
4 Plaintiff's Exhibit 1.

5 MR. SAULITIS: No objection.

6 THE COURT: Received.

7 (Plaintiff's Exhibit 1 received in evidence)

8 Q. I'll ask you to look at Plaintiff's Proposed Exhibit 16.  
9 You testified earlier about maintaining websites to hold some  
10 of your images out for people to license even though they were  
11 taken for some other publication previously. What is  
12 Exhibit 16?

13 A. This is an -- Exhibit 16 is a screenshot from -- from my  
14 portfolio website.

15 Q. So whose website is 16?

16 A. This is my website.

17 Q. And what's the purpose of having a photo on that website?

18 A. The purpose of having this photo on this website is to show  
19 people my work, to show people images that they could  
20 potentially license if they wanted to license that type of  
21 image, and to -- to also give my contact information so people  
22 can contact me and to -- that's -- those are the reasons.

23 MR. COWLEY: Your Honor, plaintiff moves for admission  
24 of Plaintiff's Proposed Exhibit 16.

25 MR. SAULITIS: No objection.

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1 THE COURT: Received.

2 (Plaintiff's Exhibit 16 received in evidence)

3 Q. Looking at that image as listed on your website, do you see  
4 below the photograph itself it says, "All content © 2017 Lisa  
5 Corson," and then an email address and phone number?

6 A. Yes.

7 Q. Is that something you put on there?

8 A. Yes, it is.

9 Q. Why?

10 A. Because even though the law does not require me to have a  
11 copyright symbol next to my images, I -- my understanding is  
12 that it's good practice as a photographer to assert my  
13 copyright just to clarify on my website and to publicly state  
14 that I indeed own a copyright to all of these images on my  
15 website.

16 THE COURT: Why did you put down 2017 when this item  
17 has a certificate of registration of March 18, 2015?

18 THE WITNESS: My understanding is that it's general  
19 practice to change the date, the copyright date on your website  
20 to be the current year.

21 THE COURT: The year you're publishing it again.

22 THE WITNESS: Yes. So my website currently reads  
23 copyright 2018.

24 BY MR. COWLEY:

25 Q. I'm going to ask you to look at Plaintiff's Proposed

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1 Exhibit 5. What is that document?

2 A. This is the Brown Harris Stevens bhshamptons.com website,  
3 and this is the Talk of the Town blog.

4 Q. Do you see your photograph in that screenshot?

5 A. Yes, I do.

6 Q. When did you see that --

7 THE COURT: It's a reprint of a Wall Street Journal  
8 article, isn't it, with your photograph?

9 THE WITNESS: Yes, it is.

10 Q. This reprint, first of all, when did you see it?

11 A. I saw this -- I don't remember the first time I saw this.  
12 I saw it when I was -- I work with ImageRights, and when I was  
13 looking through my ImageRights account and the images that it  
14 brought up that were uses of my images online, that directed me  
15 to this link. I visited the site the day that -- I believe it  
16 was September 21, 2015. I visited the site to verify that the  
17 image was there, that it was my image, and to submit that  
18 information and other information to ImageRights to begin  
19 connecting me with an attorney to --

20 Q. When you took those steps, were you looking at the Brown  
21 Harris Stevens of the Hamptons website itself?

22 A. Yes, I was.

23 Q. Did you see all of the photographs and the video that were  
24 published by The Wall Street Journal also copied and printed  
25 there?

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1 A. No. I saw the one photograph.

2 Q. Just the photograph that's shown on this page of the screen  
3 print.

4 A. Yes.

5 Q. Prior to your finding this on the website after being  
6 informed by ImageRights, had Brown Harris Stevens of the  
7 Hamptons ever given you notice that it had your photograph?

8 A. No. I've never been contacted by them.

9 Q. What permission, if any, did you provide to Brown Harris  
10 Stevens to copy and display your photograph?

11 A. No permission.

12 Q. I'm going to ask you to look at Exhibit No. 12. And is  
13 Plaintiff's Proposed Exhibit No. 12 another screenshot with  
14 text below the top of the same article on the Brown Harris  
15 Stevens website that you referred to a moment ago in Exhibit 5?

16 A. Yes, it is.

17 Q. Do you see here, it says September 22, 2015 date at the  
18 bottom on the printout?

19 A. Yes, I do.

20 Q. Is that about the time that you saw online and confirmed  
21 that ImageRights had found your photo?

22 A. Yes, it was the day after.

23 MR. COWLEY: Your Honor, plaintiff moves for admission  
24 of Proposed Exhibit 12.

25 MR. SAULITIS: No objection.

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1 THE COURT: Received.

2 (Plaintiff's Exhibit 12 received in evidence)

3 THE COURT: Same story, same photograph, right?

4 THE WITNESS: Yes, your Honor.

5 BY MR. COWLEY:

6 Q. You mentioned working with ImageRights. Can you explain to  
7 the Court what that means.

8 A. So I pay a yearly fee to ImageRights to be -- to use their  
9 service, and part of their service entails me uploading small  
10 jpgs of all of the images that I want to look out for  
11 infringements of, so they have some kind of computer program  
12 that searches by image rather than by name, so their program  
13 searches the web for all of the images that I upload, and then  
14 I go on the web, on the ImageRights website, into my account,  
15 and I can see where those -- where those images were used, I  
16 can see the URL of the site where the image is displayed, and I  
17 can see the URL of the site where the image is stored on the  
18 infringer's server, and I go through a lot of those, hundreds,  
19 if not thousands of those sightings and I determine whether a  
20 use is an authorized use, because all of the Wall Street  
21 Journal, all of the WSJ.com usages appear as well, so I sort  
22 them based on whether it's an authorized use or an unauthorized  
23 use, and then ImageRights helps me determine whether a user is  
24 just an individual with a blog that is not monetizing that or  
25 if it's a company and -- and then they help me find lawyers who



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1 will work on contingency to pursue infringement, to pursue  
2 licensing.

3 Q. When did you begin working with them?

4 A. I don't remember exactly. It was either 2013 or 2014. I  
5 think it was 2014.

6 Q. Prior to beginning work with ImageRights, did you  
7 experience any infringements of your work online?

8 A. Yes, I did.

9 Q. And how was it that you were able to find those  
10 infringements before using ImageRights?

11 A. I would search for my name in quotes on Google, and then  
12 look at Google Images.

13 Q. When you reviewed the Brown Harris Stevens website that  
14 reproduced The Wall Street Journal article and reproduced your  
15 photo, what credit or what naming of you on that website did  
16 you find?

17 A. My name was not on the website.

18 Q. So prior to hiring ImageRights to work for you, would you  
19 have any way on your own of even finding this infringement?

20 A. I would not have had an easy way of finding it. If I had  
21 Googled, if I had searched Google Images with each of my images  
22 individually, it would have appeared, but I have thousands of  
23 images. I don't know that I would have thought to search this  
24 one. I searched for some celebrity pictures I've taken before,  
25 but I don't think I would have --

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1 THE COURT: How did you find this one?

2 THE WITNESS: Through ImageRights, through their  
3 computer program that searches thousands of my images  
4 constantly.

5 THE COURT: Do artists and photographers engage a  
6 company like that to do those kinds of searches?

7 THE WITNESS: They do. There's a few companies now  
8 that do, like ImageRights.

9 THE COURT: It's to protect copyright interests?

10 THE WITNESS: Yes.

11 BY MR. COWLEY:

12 Q. How much do you pay for that?

13 A. I pay a yearly fee and I pay a percentage of each  
14 settlement.

15 Q. How much?

16 A. At the time of this infringement, I -- the lawyer that I'd  
17 worked with would get a certain fee that -- I think that varies  
18 sometimes, and then my -- and then the expenses, with any court  
19 costs, any expenses would be taken off, and then ImageRights  
20 and I would split the remainder of the settlement. At the time  
21 of this infringement, our split was 55 percent for me and  
22 45 percent for ImageRights, and that is after the attorney  
23 takes their percentage. And it's currently changed a little  
24 bit now. It's 50/50, ImageRights and me, after the attorney's  
25 fee and costs.

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1 THE COURT: Any attorney engaged by the image company?

2 THE WITNESS: The ImageRights suggests an attorney and  
3 I -- they facilitate an introduction, but then I then enter  
4 into an agreement with the attorney directly and then  
5 correspond with the attorney directly, typically, your Honor.

6 Q. In this case what did you do after confirming that the --

7 THE COURT: The attorney bills you, or bills  
8 ImageRights?

9 THE WITNESS: The --

10 THE COURT: How does it go mechanically? You make a  
11 settlement, say, of a thousand dollars. The attorney would  
12 take off his fee. Typically what is his fee?

13 THE WITNESS: It's a percentage of the settlement.

14 THE COURT: 33?

15 THE WITNESS: It's between -- it's generally between  
16 30 and 40 percent, depending on how far the case goes, how long  
17 it has gone.

18 BY MR. COWLEY:

19 Q. After confirming that the notice that ImageRights gave you  
20 of the Brown Harris Stevens site did in fact have your  
21 photograph on that site, what did you do?

22 A. I'm sorry. Could you repeat the question?

23 Q. You testified earlier, when I asked you how it was that you  
24 came to look at the Brown Harris Stevens website to see the  
25 article with your picture, you explained that it was after

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1 ImageRights gave you notice that there was a URL with that  
2 image found; you explained to the Court that you went and  
3 looked at the website, confirmed it was there and it was yours.  
4 What did you then do?

5 A. I provided -- I provided ImageRights with the copyright  
6 registration and all of the information in the certificate, the  
7 date, whether it was -- I notified them whether it was -- that  
8 it was published, or that it was registered before it was  
9 published, and I agreed to -- I agreed to have them then submit  
10 that information to an attorney to look over and determine  
11 whether it was an infringement we would be pursuing.

12 Q. And at some point did you engage my firm?

13 A. I did. I signed a letter.

14 Q. Now when you began working with my firm, did you enter a  
15 contingency agreement directly with my firm?

16 A. Yes, I did.

17 Q. And that's in addition to your agreement with ImageRights  
18 where they have a contingent portion of their compensation in  
19 addition to their flat charge, correct?

20 A. Yes.

21 Q. And you signed --

22 THE COURT: Your fee was cut off first and then it  
23 would be a 55/45 split with -- what's the name of the company,  
24 Image?

25 THE WITNESS: ImageRights.

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1 MR. COWLEY: The only correction, your Honor, is that  
2 the costs come first. They're paid as they go by -- or they  
3 come first, then our fee, then ImageRights, and Ms. Corson's  
4 split, based on their contract.

5 THE COURT: What's your percentage?

6 MR. COWLEY: When we commenced the lawsuit, it was  
7 35 percent. When we commenced discovery, 40.

8 THE COURT: So that's 40 percent.

9 MR. COWLEY: Yes. And I would also say, for  
10 completeness, your Honor, before we commenced the lawsuit, it  
11 was only 30. And that's --

12 THE COURT: I think I know. Let's move on.

13 BY MR. COWLEY:

14 Q. Ms. Corson, please turn to Tab 13, Plaintiff's Proposed  
15 Exhibit 13.

16 What did you initially engage us to do about the Brown  
17 Harris Stevens posting of your photograph on their website?

18 MR. SAULITIS: Objection, your Honor. Best evidence  
19 would be the engagement letter.

20 THE COURT: That's not going to be disputed, is it?

21 MR. SAULITIS: No.

22 THE COURT: I assume at a point in time a letter was  
23 written, right, a cease and desist letter, right?

24 MR. COWLEY: That's all I was having her state for the  
25 record.

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Corson - Direct

1 THE COURT: What's the exhibit?

2 MR. COWLEY: There is no letter because I didn't put  
3 the letter or the demand in. I put the response back because  
4 that --

5 THE COURT: What was the response?

6 MR. COWLEY: Tab 13, your Honor.

7 BY MR. COWLEY:

8 Q. So Ms. Corson, is it correct that a notice of infringement  
9 and a demand to Brown Harris Stevens went out --

10 THE COURT: Just don't repeat. We're on the response.  
11 This is the response, Exhibit 13?

12 BY MR. COWLEY:

13 Q. Ms. Corson, what is Exhibit 13?

14 A. Exhibit 13 is an email, email correspondence between you  
15 and Mr. Saulitis.

16 Q. I'm sorry. I identified the wrong -- I said 13 but I meant  
17 11.

18 A. Okay.

19 Q. Ms. Corson, what is Exhibit 11? And I apologize for my  
20 error.

21 A. Exhibit 11 is correspondence between you and Babette Krolik  
22 from Terra Holdings and --

23 Q. Was this the response to our initial demand to Brown Harris  
24 Stevens?

25 A. I believe so. It's a response to the January 4, 2016

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Corson - Direct

1 letter from you notifying them of their infringement.

2 Q. Now --

3 MR. SAULITIS: I'm sorry. May I see a copy, please.

4 There's no demand letter to which that responds.

5 Could we also have that. It seems to be a half of --

6 THE COURT: He said because of the case settlement  
7 numbers --

8 MR. COWLEY: It's got the case settlement.

9 THE COURT: Do you want it? Mr. Saulitis?

10 MR. SAULITIS: Yes. I think for completeness, it's --

11 THE COURT: Yes or no, do you want it in?

12 MR. SAULITIS: Yes.

13 THE COURT: Submit it. Offer it.

14 MR. COWLEY: I don't have it.

15 THE COURT: Do you have it, Mr. Saulitis?

16 MR. SAULITIS: No.

17 THE COURT: Okay. So we'll do without it.

18 BY MR. COWLEY:

19 Q. Ms. Corson --

20 MR. SAULITIS: And no objection otherwise.

21 THE COURT: Good. 11 is received.

22 (Plaintiff's Exhibit 11 received in evidence)

23 BY MR. COWLEY:

24 Q. Ms. Corson, I'd ask you to look at the email from Babette  
25 Krolik. It has a Terra Holdings --

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Corson - Direct

1 THE COURT: Apart from the document, one of the issues  
2 here is how quickly Brown Harris Stevens took down the  
3 infringing copy. How are you going to prove that?

4 MR. COWLEY: Well, your Honor, I was turning right to  
5 what they said they did and what they actually did.

6 THE COURT: How do you prove what they actually did?

7 MR. COWLEY: Well, there's two ways, but  
8 Mr. Davidowicz testified to it, which is already before you in  
9 his 30(b)(6) testimony.

10 THE COURT: Okay. Go ahead. Proceed.

11 BY MR. COWLEY:

12 Q. Ms. Corson, looking at Ms. Krolik's email, starts at the  
13 bottom of the first page, goes on to the second page, and says  
14 that she's responding to the letter for Brown Harris Stevens.  
15 Do you see halfway through that paragraph it says the  
16 picture -- the story only appeared briefly in March or April of  
17 2015 on the Brown Harris Stevens --

18 THE COURT: I can read the letter myself. It's in  
19 evidence, right?

20 MR. COWLEY: Yes.

21 THE COURT: Okay. So why do you need to have  
22 Ms. Corson read it also?

23 BY MR. COWLEY:

24 Q. When you were informed that this was Brown Harris Stevens'  
25 response to our demand letter, did you believe that to be true?



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Corson - Direct

1 A. No, this is not true.

2 Q. And how do you know it wasn't true?

3 A. Because I saw the blog on September 21, 2015.

4 Q. And you saw the blog where, on whose website?

5 A. On Brown Harris Stevens' website.

6 Q. At the bottom of that paragraph, she informs you that Brown  
7 Harris Stevens deleted the article and pictures. Did you  
8 understand that they were conceding you owned the copyrights  
9 and that they had no --

10 THE COURT: That's an issue. What she understands is  
11 of no relevance.

12 MR. COWLEY: Well, it is to our request for a  
13 preliminary injunction, your Honor.

14 THE COURT: She can't prove it from her understanding.  
15 Q. Did Brown Harris Stevens ever inform you that they agreed  
16 you own the copyright and that they did not have a right to  
17 repost --

18 THE COURT: That's best evidence.

19 MR. COWLEY: Sorry, your Honor?

20 THE COURT: That's the best evidence rule. Put in the  
21 document.

22 MR. COWLEY: There is no document. No notes were  
23 provided. There's only one way to say that and --

24 THE COURT: The document is not here because you  
25 refrained from putting it in.

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Corson - Direct

1 MR. COWLEY: No, your Honor. It's here in front of  
2 you where they say they reserve all rights and they don't  
3 concede anything about the claim.

4 THE COURT: Well, all right. So that's what they say.  
5 BY MR. COWLEY:

6 Q. So my follow-up question is: Did there ever come a time  
7 where they did concede that you had owned the copyright and  
8 they had no right to post it?

9 A. Not to my knowledge, no.

10 Q. The Brown Harris Stevens general counsel, Ms. Krolik, then  
11 referred you to address your claim with The Wall Street  
12 Journal. Did you try to determine whether The Wall Street  
13 Journal in fact gave Brown Harris Stevens permission to post  
14 your photograph?

15 A. I reviewed all of the terms of use on the various Wall  
16 Street Journal sites myself on WSJ.com and on djreprints.com,  
17 which is their text licensing site, and I confirmed for myself  
18 that Wall Street Journal on those sites says that you cannot  
19 use copyrighted photographs or anything else, that third-party  
20 copyright holders are the copyright holders and you have to  
21 clear rights with them and that The Wall Street Journal does  
22 not license images.

23 MR. SAULITIS: Objection. Hearsay.

24 THE COURT: I'll allow it in. If you feel that you  
25 have a claim of right, you've got to prove a claim of right.

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Corson - Direct

1 But I'll allow it in.

2 BY MR. COWLEY:

3 Q. Following this email, what choice did you have to address  
4 your concerns with Brown Harris?

5 THE COURT: Mr. Cowley, you've proved origination,  
6 you've proved infringement, and it's up to Mr. Saulitis to show  
7 whatever claim of right he has and how long it took them to  
8 take it down.

9 MR. COWLEY: I'm addressing a different issue, and I  
10 apologize if my question was confusing. I'm stressing the  
11 argument that we somehow only want to run up attorney's fees.

12 THE COURT: You have a right to sue. You have a right  
13 to sue.

14 MR. COWLEY: I'm trying to address the argument.

15 THE COURT: You make the point that they didn't take  
16 it down promptly so you sued. You have a right.

17 You have a right to sue to take full advantage of what  
18 the law provides you.

19 BY MR. COWLEY:

20 Q. Ms. Corson, what effect on your business does the  
21 infringement, such as what you found on Brown Harris Stevens'  
22 website, does that image have?

23 A. It's impossible to determine. I don't know how many people  
24 saw the article and were interested in that photograph  
25 specifically, and, you know, maybe they wanted to contact me to

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Corson - Direct

1 license it, but my name is not there so they don't know who  
2 took the photograph. Another part of my business is just  
3 people seeing pictures of mine out there in prestigious  
4 publications and other areas where, you know, they see -- they  
5 see my work and they see the quality of my work and the types  
6 of things that I photograph. Luxury homes are not available to  
7 everyone, so just seeing that I shoot luxury homes and the  
8 quality of my photographs then drives other people to seek me  
9 out to assign new work to me.

10 Q. Do you actually have experience in your business with that  
11 occurring on which you base to believe that it might have  
12 incurred if there was credit given you?

13 A. Yes, I do.

14 Q. What's that experience?

15 A. People contact me all the time saying that they have, you  
16 know, seen my work in Los Angeles Magazine, in The Wall Street  
17 Journal, in Sunset Magazine, wherever they've seen it, and that  
18 they'd like to hire me to -- to photograph something. They  
19 typically will see my name, Google it, find my website, which  
20 contains my email and my phone number, and they'll contact me  
21 and ask me to do work for them.

22 Q. Have you tried to quantify an amount of actual losses from  
23 business that did not come to you as a result of an  
24 infringement like this and not including your name?

25 A. No. I have no way of knowing.

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Corson - Direct

1 Q. What kind of use of your photographs did you find Brown  
2 Harris was making on its website when it posted your image?

3 A. Well, the website -- it's a commercial website. They're  
4 using it to drive traffic to their website in order to sell  
5 luxury homes, so --

6 Q. And have you tried to quantify a claim to disgorge the  
7 amount that they earned as a result of using your photograph to  
8 do that?

9 A. I have no way of knowing.

10 Q. And how could you know how many customers might have --

11 THE COURT: She can't know.

12 MR. SAULITIS: Objection.

13 THE COURT: She can't know. Unless the customers tell  
14 her.

15 Q. As a result of not being able to quantify your profit or  
16 their profits that they may have gained -- excuse me. Start  
17 the question over.

18 As a result of being unable to quantify what profits  
19 you may have lost in that the customers never called you, and  
20 profits that they may have gained from customers who did call  
21 them, what are you seeking in this case?

22 MR. SAULITIS: Objection.

23 THE COURT: You're seeking statutory damages for the  
24 infringement and you're seeking injunction.

25 MR. COWLEY: Your Honor, it's my understanding, for

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Corson - Direct

1 the record, I was supposed to have the testimony -- nothing has  
2 been agreed upon from this case in the beginning, so if I don't  
3 have it on the record --

4 THE COURT: The record is your complaint. The  
5 complaint is in the record. That's what you're suing for. You  
6 want to stop them from doing this and you want to have  
7 statutory damages.

8 Anything else? Mr. Cowley?

9 MR. COWLEY: Yes, your Honor. Just a couple more  
10 questions, I believe.

11 BY MR. COWLEY:

12 Q. Given the nature of your work, the types of photographs you  
13 take and where they're found, do you have any concern that this  
14 might be repeated again by Brown Harris Stevens in the future  
15 if they're not ordered to not do it?

16 A. Definitely.

17 Q. What's that concern based on?

18 A. Well, I photograph a lot of luxury homes for Wall Street  
19 Journal. I've photographed over 20 over the years, maybe  
20 closer to 30. You know, looking at that blog, it kind of -- it  
21 relies on -- it's entirely copying articles, you know, from  
22 other publications, often from The Wall Street Journal, and  
23 because I'm shooting a lot of luxury homes, it's highly  
24 possible that an article that I photographed could be copied to  
25 that blog in the future or to their website in general.

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Corson - Direct

1 MR. COWLEY: Your Honor, before I rest with this  
2 witness, I would like to address the issue that the Court had  
3 to do with the defendant's contested objection. If it is going  
4 to be allowed in, I will question the witness about those  
5 issues. If the Court agrees with me that they're not issues  
6 that can be presented to the Court, obviously I won't present  
7 testimony, against my objection. May I explain?

8 THE COURT: No. Just ask questions. Seems to me  
9 we're finished.

10 MR. COWLEY: Well, your Honor, the defendants have put  
11 forward a proposed exhibit Rule 68 offer to --

12 THE COURT: Just ask questions.

13 BY MR. COWLEY:

14 Q. Ms. Corson, when -- well, did you receive --

15 THE COURT: Don't anticipate the defense. You'll have  
16 an opportunity to come back on rebuttal.

17 MR. COWLEY: Thank you, your Honor. I will exercise  
18 that opportunity.

19 THE COURT: Okay. So you're finished?

20 MR. COWLEY: Let me just check the exhibits, your  
21 Honor.

22 If I did not say already, I move for admission of  
23 Exhibit 5, which was the Brown Harris Stevens printout that  
24 showed the top of the printout that shows the Talk of the Town.  
25 I believe there was no objection.

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Corson - Cross

1 THE COURT: 5 is in evidence. And 12 is in evidence.  
2 What's in evidence is 2, 3, 4, 1, 16, 5, and 12.

3 (Plaintiff's Exhibit 5 received in evidence)

4 MR. COWLEY: Thank you, your Honor. No further  
5 questions at this time.

6 THE COURT: All right. You're surrendering the podium  
7 now to Mr. Saulitis?

8 MR. COWLEY: I do, your Honor.

9 THE COURT: Is 11 in evidence?

10 MR. COWLEY: I have it, yes, as being allowed in  
11 evidence.

12 THE COURT: 11 is in evidence. Thank you.

13 CROSS-EXAMINATION

14 BY MR. SAULITIS:

15 Q. Good morning, Ms. Corson. Thank you for your direct  
16 testimony.

17 You talked about the photo shoot that was in March of  
18 2015 at which you took the picture that brings us here. Do you  
19 remember that day?

20 A. I do.

21 Q. How long did the photo shoot last, from the time you  
22 started to travel to the time you finished and went home?

23 A. It lasted around eight hours, maybe a little bit more.

24 Q. Is that a normal photo shoot day in the course of your  
25 professional photography business?



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Corson - Cross

1 A. It was a longish day, but that's not abnormal.

2 Q. And --

3 THE COURT: Where was the house you photographed?

4 THE WITNESS: The house was in Beverly Hills, your  
5 Honor.

6 THE COURT: And did you have an office in Beverly  
7 Hills?

8 THE WITNESS: No. I live in Ojai.

9 THE COURT: So it's about a two-hour drive, three-hour  
10 drive, right?

11 THE WITNESS: Yes.

12 THE COURT: Back and forth.

13 THE WITNESS: Yes, your Honor.

14 THE COURT: So you're driving about five hours, let us  
15 say? And how long was the shoot?

16 THE WITNESS: The shoot was maybe four hours.

17 THE COURT: Okay.

18 BY MR. SAULITIS:

19 Q. And the agreement was that you would be compensated for  
20 your mileage at 49 cents a mile?

21 A. Yes.

22 Q. Reimbursement for your mileage.

23 A. Yes.

24 Q. Now who chose the subject, the area, the location to be  
25 photographed by you?

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Corson - Cross

1 A. Someone connected to The Wall Street Journal.

2 Q. So they arranged -- that someone was somebody, who? What's  
3 the name of that person?

4 A. Are you asking who set up the photo shoot?

5 Q. Yes. Was that Dana Kien?

6 A. Yes, it was.

7 Q. And that's somebody you know over The Wall Street Journal?

8 A. Yes, it is.

9 Q. And that's the person who from time to time asks you to do  
10 photography for them?

11 A. Yes, it is.

12 Q. And Dana was in charge of getting photography for an  
13 article that The Wall Street Journal was planning on writing?

14 A. Correct.

15 Q. And in fact invited you to be the photographer of the  
16 pictures for that article.

17 A. Correct.

18 Q. And you went to the designated location, brought your  
19 equipment, and proceeded to take pictures there?

20 A. Yes.

21 Q. And did Ms. Kien or anybody else from The Wall Street  
22 Journal side ask you to take pictures of certain subjects that  
23 were there?

24 A. Yes.

25 Q. And that included the area that you ultimately photographed

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Corson - Cross

1 as part of this case?

2 A. Included generally the exterior and the grounds of the  
3 property, in addition to a number of other things.

4 Q. These are called spec houses, fancy Beverly Hills kind of  
5 homes?

6 A. It's a house that a developer built without a buyer, just  
7 built because they wanted to build that type of home. It's a  
8 showcase home.

9 THE COURT: In hopes of finding a buyer.

10 THE WITNESS: Yes, your Honor.

11 Q. And so approximately how many photographs over the course  
12 of the four-hour shoot did you actually take? How many times  
13 did that shutter go off on your camera, if that's what you use?

14 A. I don't recall.

15 Q. More than a hundred?

16 A. Several hundred. Every time I shoot any assignment, I  
17 shoot a large number of images.

18 Q. Those images are stored on your camera?

19 A. Yes, they are.

20 Q. Are they digital images?

21 A. Yes, they are.

22 Q. So it's not a film situation.

23 A. No.

24 Q. Only digital?

25 A. Only digital.

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Corson - Cross

1 Q. What format are they stored on the camera, jpg or something  
2 else?

3 A. The file extension is .cr2. It's referred to as a raw  
4 file.

5 Q. And then after you were done with the photo shoot, you had  
6 all these images on your camera. What did you do next?

7 A. You mean what did I do next with the photographs?

8 Q. Yes.

9 A. Okay. I -- I -- the photographs are stored on a card that  
10 I eject from the camera and I plug into a device that reads it,  
11 which is attached to my computer, and I download all of those  
12 images onto my hard drive using a program called Adobe  
13 Lightroom.

14 Q. And then what do you do using -- well, you already covered  
15 that.

16 After you're done doing whatever you did with Adobe  
17 Lightroom, how do you get the pictures to The Wall Street  
18 Journal, the person who commissioned you for the job?

19 A. I select those images in Adobe Lightroom and I export them  
20 as a .jpg file and then I log onto The Wall Street Journal's  
21 FTP site and upload those images.

22 Q. FTP means file transfer protocol?

23 A. I believe so.

24 Q. And so that was done the same day as the photo shoot or the  
25 next day or --

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Corson - Cross

1 A. I don't recall. Within a few days.

2 Q. Okay. So the files are converted to jpgs, which are  
3 smaller format, correct?

4 A. Correct.

5 Q. And then they're sent electronically to The Wall Street  
6 Journal to complete the job, correct?

7 A. Correct.

8 THE COURT: You send the entire shoot or select?

9 THE WITNESS: A selection of them.

10 THE COURT: You select them yourself.

11 THE WITNESS: I do, your Honor.

12 THE COURT: So you go through an editing process.

13 THE WITNESS: Yes, I do.

14 THE COURT: How long does that take?

15 THE WITNESS: A number of hours.

16 Q. And how many jpgs did you upload to Wall Street Journal for  
17 that photo shoot?

18 A. I don't recall the exact number.

19 Q. What is your best recollection of the number of jpgs you  
20 sent to Ms. Kien at the Wall Street Journal?

21 A. Maybe 75.

22 Q. And now when you were done with that process, did you send  
23 a bill to The Wall Street Journal for your service?

24 A. Yes, I did.

25 Q. And if I could show the witness a copy of what has been

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Corson - Cross

1 marked as Exhibit B for identification, which comprises a bill  
2 and an attached receipt. That would be B in the book,  
3 Ms. Corson.

4 A. Yes.

5 Q. Do you see that there?

6 A. I do.

7 Q. Is that a copy of your bill and the attachments that were  
8 sent there, that you sent to Dana Kien of the Wall Street  
9 Journal on March 13, 2015?

10 A. Yes, it is.

11 Q. And you were paid that sum of money?

12 A. Yes, I was.

13 Q. And that you were reimbursed for a burrito at Chipotle and  
14 for your mileage of \$78.40, \$9.43 for the burrito?

15 A. Looks like it, yes.

16 MR. SAULITIS: I offer the document.

17 MR. COWLEY: No objection, your Honor.

18 THE COURT: Received.

19 (Defendant's Exhibit B received in evidence)

20 Q. Now in the course of arranging for the photo shoot with  
21 Ms. Kien, you mentioned on your direct examination that this  
22 was done via email conversation?

23 A. Yes.

24 Q. Can you take a look at the book that's been marked as  
25 Exhibit A, please.

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Corson - Cross

1 A. Yes.

2 Q. Do you have that in front of you there?

3 A. I do.

4 Q. Can you confirm for me that that is a copy of the email  
5 communications you had with Ms. Kien concerning your being  
6 engaged for the photo shoot of that day?

7 A. Yes.

8 MR. SAULITIS: I'd offer the document into evidence.

9 MR. COWLEY: No objection, your Honor.

10 THE COURT: Received.

11 (Defendant's Exhibit A received in evidence)

12 Q. And you were paid the agreed amount?

13 A. Yes.

14 Q. And you showed us as Exhibit 16 in evidence a shot from  
15 your website that contains the same photograph for a similar  
16 photograph?

17 A. Yes.

18 Q. And that was the way that it appeared sometime in 2017?

19 A. Yes.

20 Q. And you kept that photograph on your website over what  
21 period of time, including the present?

22 A. I'm trying to recall when I first posted it. I believe I  
23 posted it in 2016.

24 Q. 2016?

25 A. I believe so, yes.

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Corson - Cross

1 Q. Would you say early 2016, middle, late?

2 A. I believe it was January.

3 Q. Okay. And that's been in your web portfolio ever since  
4 that time?

5 A. Yes, it has.

6 Q. And have you ever received or have you ever provided a  
7 price list for the photo on any kind of a price list for  
8 licensing or sale?

9 A. No, I have not.

10 Q. Have you ever received from someone outside, unrelated to  
11 you, an offer to license that photograph from someone who has  
12 seen it perhaps on your website or elsewhere?

13 A. No.

14 Q. It is available for license, is it not?

15 A. It is on my portfolio website. It is not on my stock  
16 agency website, my personal stock agency website or the outside  
17 agency that I use.

18 Q. So you mentioned that you have a stock agency. I think you  
19 called it Gallery Stock?

20 A. Yes.

21 Q. Can you just tell us what that means to have a stock  
22 agency.

23 A. I enter into an agreement with Gallery Stock to exclusively  
24 license some of my images to anyone who's interested in  
25 licensing them, both editorial and commercial clients, but they



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Corson - Cross

1 require that they be the exclusive licensor of those images, so  
2 I'm limited as to what I can give to them to license.

3 Q. You've never licensed this particular photograph to Gallery  
4 Stock, have you?

5 A. No, I have not.

6 Q. And you mentioned something about syndication photos. Can  
7 you explain what syndication means in your world.

8 A. Syndication is just another term for licensing, typically  
9 applies to newspapers and magazines where the licensing is  
10 everything; the licensing is letting anybody use the image.  
11 Syndication is -- it's just another term for letting a magazine  
12 or a newspaper use your image for --

13 Q. Have you ever offered the particular photograph for any  
14 kind of syndication?

15 A. I have not.

16 Q. Have you received an offer from someone who wanted to  
17 syndicate it from you?

18 A. No.

19 Q. And how about some of the other photographs from the same  
20 photo shoot --

21 A. No.

22 Q. -- that you took? Have you ever received an offer for any  
23 of those photographs?

24 A. No, I have not.

25 Q. Have you offered any of those photographs for sale to

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Corson - Cross

1 anyone in the outside world, other than The Wall Street  
2 Journal?

3 A. Not specifically.

4 Q. How about generally?

5 A. A few of them are available on my website.

6 Q. And from that same photo shoot, do you have any kind of  
7 asking price for any of those photos?

8 A. The price greatly varies.

9 Q. Did you post an asking price for any of the photos that are  
10 available on your website for purchase?

11 A. No.

12 Q. Has anyone ever given you an offer to purchase or license  
13 any of those other photographs from the same photo shoot?

14 A. No.

15 Q. So the only deal that you've ever had involving this  
16 photograph --

17 THE COURT: Wall Street Journal.

18 Q. -- was The Wall Street Journal for \$600 for 75 -- a photo  
19 shoot comprising approximately 75 photos?

20 THE COURT: No. She got 600 bucks for a photo shoot.

21 Q. Photo shoot. And from that photo shoot --

22 THE COURT: Mr. Saulitis, I have it.

23 MR. SAULITIS: Okay.

24 Q. Has that particular photograph ever been displayed in a  
25 kind of artistic setting?

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Corson - Cross

1 A. Only on my website.

2 Q. And you testified that in September of 2016 it came to your  
3 attention that the photo appeared on Brown Harris Stevens'  
4 website, is that accurate?

5 A. Correct.

6 Q. And you yourself looked at Brown Harris Stevens' website  
7 then and saw your photo on that website, correct?

8 A. Yes.

9 Q. Did you then take any steps to contact Brown Harris Stevens  
10 to say, that's my photo, take it down, or, pay me, or some  
11 words to that effect?

12 A. I did not. I haven't found that successful in the past.

13 Q. I just want to know if you did it.

14 A. No, I did not.

15 Q. Did you do anything to -- did you check a month later to  
16 see -- a month later, two months later, three months later --  
17 to see if that image was still on the Brown Harris website?

18 A. I don't recall.

19 Q. Other than the January 4th demand that was made on your  
20 behalf by Mr. Cowley, had there been any other steps taken  
21 prior to then to get the photo off the website?

22 A. Not to my knowledge.

23 Q. And did you ever go onto the Brown Harris Stevens website  
24 after January 5th of 2015 when the demand was made and look to  
25 see if the photo was still there?

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Corson - Cross

1 A. I might have. I don't recall specifically. I did this  
2 week.

3 Q. What did you see? Did you see it there this week?

4 A. I did not.

5 Q. So other than what you saw, do you have any recollection,  
6 after January 5th of 2016, of ever having seen that photograph  
7 on Brown Harris Stevens' website?

8 A. I don't recall.

9 Q. Have you ever seen a screen print of that photograph,  
10 screen print of Brown Harris Stevens that was made or dated  
11 after January 5th of 2016?

12 A. A screenshot?

13 Q. Yeah, a screenshot.

14 A. I don't believe so.

15 Q. If someone were to have -- I mean, if somebody sees  
16 something on the web, it takes about one or two clicks to make  
17 a screenshot of that?

18 MR. COWLEY: Objection, your Honor.

19 Q. If somebody has seen it, is it easy to make a screenshot of  
20 something on the web, a photograph?

21 MR. COWLEY: Objection.

22 THE COURT: Sustained.

23 Q. Now when you looked at the Brown Harris Stevens website in  
24 September 2015, did you click on the hyperlink to the original  
25 article?

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Corson - Cross

1 A. I don't recall.

2 Q. Okay. Do you recall seeing that there was a hyperlink on  
3 which a viewer could click onto the original Wall Street  
4 Journal article?

5 A. I don't recall.

6 Q. Do you know whether, if you clicked the hyperlink to that  
7 on the website, whether, going to the original source, your  
8 name would be on the photograph that was on The Wall Street  
9 Journal original web --

10 THE COURT: Ask another question.

11 Q. Do you know if the Wall Street Journal, the article that  
12 was published by The Wall Street Journal on its website  
13 contained a credit to you?

14 A. Yes, it did.

15 THE COURT: But the item on the Brown Harris Stevens  
16 did not.

17 THE WITNESS: No, it did not, your Honor. The  
18 hyperlink only displays the -- that image if you log into the  
19 site.

20 THE COURT: If you what?

21 THE WITNESS: If you log into The Wall Street  
22 Journal's site. They have a pay wall. You have to be a  
23 subscriber to see the full site, so you would have not seen  
24 this image, which was lower in the article.

25 THE COURT: You would not have seen the image at all.

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Corson - Cross

1 THE WITNESS: Not on The Wall Street Journal site,  
2 until you logged in.

3 THE COURT: Anything more, Mr. Saulitis?

4 MR. SAULITIS: I'm just checking my notes, because I  
5 may be close to being finished.

6 THE COURT: I think you are finished.

7 Q. Oh. Have you ever had the photo, today's photo appraised  
8 by anyone?

9 THE COURT: Not necessary for damages.

10 MR. SAULITIS: But actual damages are relevant to a  
11 consideration of statutory damages.

12 THE COURT: There are no actual damages.

13 MR. SAULITIS: A reasonable license fee is deemed to  
14 be a measure of actual damages under the --

15 THE COURT: Ask your question.

16 BY MR. SAULITIS:

17 Q. Have you ever had the photograph appraised by any kind of  
18 an appraisal service to determine what its value might be?

19 A. I don't think an appraisal service exists for licensing  
20 photographs.

21 Q. Is there any kind of a -- have you ever consulted any  
22 source to get an independent professional opinion as to what  
23 the value of that photograph might be?

24 MR. COWLEY: Objection, your Honor.

25 THE COURT: Overruled.

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Corson - Redirect

1 A. Of that specific photograph? No.

2 Q. Yes. And how about of any of the photographs that were  
3 taken at the same photo shoot?

4 A. Those specific photographs? No.

5 Q. Well, the ones that you took --

6 THE COURT: She said no.

7 Q. -- at the photo shoot.

8 THE COURT: She said no.

9 MR. SAULITIS: May I check for two seconds.

10 Thank you very much, Ms. Corson.

11 THE COURT: Redirect?

12 MR. COWLEY: Yes, your Honor.

13 REDIRECT EXAMINATION

14 BY MR. COWLEY:

15 Q. Ms. Corson, near the end of the questioning by  
16 Mr. Saulitis, he asked you what would happen if someone did  
17 find the hyperlink on the Brown Harris Stevens website and  
18 clicked through The Wall Street Journal. You explained that  
19 someone would have to be a subscriber to even get to The Wall  
20 Street Journal article. If someone was and entered their  
21 password and saw it and Image No. 1 in the slide show was on  
22 that article online, would they see a credit to you as the  
23 photographer of Image No. 14 in the slide show?

24 A. No. They would have to scroll through to Image No. 14 to  
25 see that specific information.

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Corson - Redirect

1 Q. At the beginning of Mr. Saulitis' questions, he asked you  
2 about the amount of work and the number of photographs  
3 resulting from the work that you had to put in on this Wall  
4 Street Journal assignment and he asked you about the charge for  
5 that work and what you were paid. Why were you willing to do  
6 so much work to be paid so little in order to have your  
7 photograph in the Wall Street Journal?

8 MR. SAULITIS: Objection.

9 THE COURT: Sustained.

10 Q. Ms. Corson --

11 THE COURT: One minute. One minute.

12 Q. Ms. Corson, why did you agree to accept the amount paid by  
13 The Wall Street Journal that's reflected in Defendant's Exhibit  
14 B?

15 MR. SAULITIS: Objection.

16 THE COURT: Sustained.

17 MR. COWLEY: May I have the basis, your Honor, so I  
18 can understand how to rephrase the question.

19 THE COURT: Not relevant.

20 Q. Ms. Corson, is there some aspect of your business that  
21 you --

22 THE COURT: You did what you need to do. There's  
23 nothing that Mr. Saulitis did that was a surprise to you. Why  
24 do you go on? Why don't you say, "I'm finished"?

25 MR. COWLEY: Thank you, your Honor. I'm finished.



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Davidowicz - Direct

1 THE COURT: You can step down, Ms. Corson.

2 THE WITNESS: Thank you, your Honor.

3 (Witness excused)

4 THE COURT: Next witness. Do you rest?

5 MR. COWLEY: No, your Honor. Mr. Davidowicz, please.

6 ERIK M. DAVIDOWICZ,

7 called as a witness by the Plaintiff,

8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. COWLEY:

11 Q. Mr. Davidowicz, I apologize for mispronouncing your name  
12 when I first called you. And I apologize in advance if I  
13 mispronounce it again.

14 THE COURT: I think no one heard it, so let's go.

15 Q. Mr. Davidowicz, are you an employee of the defendant Brown  
16 Harris Stevens of the Hamptons?

17 A. Yes, I am.

18 Q. In 2015 you were the director of advertising for Brown  
19 Harris Stevens, is that correct?

20 A. Yes, it is.

21 Q. As director of advertising in 2015, you managed several  
22 people in handling Brown Harris Stevens' advertising and  
23 marketing functions, correct?

24 A. Yes.

25 Q. Now Brown Harris Stevens is a real estate firm, correct?

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Davidowicz - Direct

1 A. Yes.

2 Q. It is based in the Hamptons and makes revenue off of real  
3 estate transactions that they place in the Hamptons to be  
4 involved in, is that correct?

5 A. That's correct.

6 Q. Customers all over the world that might have homes in the  
7 Hamptons, correct?

8 A. Yes.

9 Q. In addition to the people you manage at Brown Harris  
10 Stevens itself, you worked for several people at Terra Holdings  
11 in performing your job, correct?

12 A. Yes.

13 Q. Terra Holdings is a parent company of Brown Harris Stevens,  
14 is that correct?

15 A. Yes.

16 Q. It's your understanding that Terra Holdings, in addition to  
17 Brown Harris Stevens, owns a number of other real estate firms  
18 in luxury markets, correct?

19 A. Yes.

20 Q. In performing your functions for Brown Harris Stevens, you  
21 worked for Terra Holdings' head of public relations and  
22 employees in its marketing department, correct?

23 A. Yes.

24 Q. Terra Holdings is based here in New York City, correct?

25 A. Yes, it is.

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Davidowicz - Direct

1 Q. Mr. Davidowicz, please look at what's been marked as  
2 Exhibit -- I'm sorry -- what's been put in as Plaintiff's  
3 Proposed Exhibit 7 in the binder.

4 I'm sorry. You don't have a binder.

5 MR. COWLEY: May I approach, your Honor.

6 THE COURT: You may.

7 Q. Again, Mr. Davidowicz, I'm asking you to turn to Tab 7.

8 Before I focus on that question, in connection with  
9 your job function for Brown Harris Stevens, you worked with the  
10 Brown Harris Stevens website, correct?

11 A. I work with the Brown Harris Stevens of the Hamptons  
12 website, not directly with the parent website, which was  
13 BrownHarrisStevens.com.

14 Q. You didn't work on it, but you're familiar that they had  
15 it, correct?

16 A. Yes.

17 Q. And the people that you worked with in managing the Brown  
18 Harris Stevens of the Hamptons website also works with and on  
19 the Terra Holdings website, correct?

20 A. No. The Brown Harris Stevens of the Hamptons website was  
21 managed by an IT consultant who worked for Brown Harris Stevens  
22 of the Hamptons, and the BrownHarrisStevens.com website is  
23 managed here in New York City by their own marketing team.

24 THE COURT: Why are we involved with Terra Holdings?  
25 What's the relevance?

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Davidowicz - Direct

1 MR. COWLEY: There's two times it's going to be  
2 relevant but including, it's relevant, your Honor, to  
3 establishing statutory damages, financial worth of the  
4 defendant, because --

5 THE COURT: Brown Harris Stevens is one of the leading  
6 realtors in the world. Do you need Terra Holdings to prove  
7 that any further?

8 MR. COWLEY: Your Honor, I would simply -- this is the  
9 only question I had about the size --

10 THE COURT: Move to another subject. They have plenty  
11 of money if your judgment warrants it.

12 BY MR. COWLEY:

13 Q. As part of your advertising and marketing functions for  
14 Brown Harris Stevens in 2015, you had responsibility for a  
15 section of its website that was called Talk of the Town,  
16 correct?

17 A. Correct.

18 Q. You individually were responsible for putting all the  
19 content in that section of the Brown Harris Stevens website,  
20 correct?

21 A. Yes.

22 Q. At some point Brown Harris Stevens stopped posting new  
23 content to the Talk of the Town section after receiving a  
24 complaint in this case, correct?

25 A. Correct.

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Davidowicz - Direct

1 Q. But prior to that you had been managing it since 2013,  
2 correct?

3 A. That's correct.

4 Q. And the blog, that Talk of the Town section took a lot of  
5 effort for Brown Harris Stevens' marketing department to  
6 maintain in a timely fashion, correct?

7 A. Yes.

8 Q. One of the goals in maintaining the Talk of the Town  
9 section of the Brown Harris Stevens website while it was being  
10 actively maintained was to grow the Brown Harris Stevens brand,  
11 correct?

12 A. Yes. As part -- to bring awareness to the company.

13 Q. All of Brown Harris Stevens' advertising and marketing  
14 efforts had that goal in mind, correct?

15 A. Correct.

16 Q. And this Talk of the Town was part of the company's overall  
17 advertising and marketing efforts, correct?

18 A. It was a part of the website -- it was a little different  
19 than normal marketing and advertising. It was part of the  
20 website design to provide content other than the direct  
21 marketing of the company or properties to provide information  
22 to the public.

23 Q. Whether normal for other companies, it was part of what  
24 Brown Harris Stevens did as part of its marketing and  
25 advertising efforts, correct?

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Davidowicz - Direct

1 A. Yes.

2 Q. And you, as the marketing and advertising director for  
3 Brown Harris Stevens, managed it personally, correct?

4 A. That is correct.

5 Q. To increase the company's brand means to make more people  
6 aware of Brown Harris Stevens, correct?

7 A. Correct.

8 Q. And the ultimate goal of making more people aware of what  
9 Brown Harris Stevens is and what it does is to try to get more  
10 customers to use those services, correct?

11 A. In a very broad sense, yes.

12 THE COURT: Why are we going over the obvious?

13 MR. COWLEY: Your Honor, the statement of facts said  
14 that there was no profit whatsoever to this and that I  
15 believe --

16 THE COURT: It was part of the marketing effort.  
17 That's clear. Part of the overall marketing effort. They may  
18 not have sold a house, there was no income here, but it was  
19 part of the overall effort to show luxury homes in the area.

20 You have to give a little credit that the judge has  
21 something going also.

22 MR. COWLEY: Your Honor, I mean absolutely no  
23 disrespect. I'm simply trying to --

24 THE COURT: Well, then ask more intelligent questions.

25 MR. COWLEY: I apologize, your Honor.

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Davidowicz - Direct

1 BY MR. COWLEY:

2 Q. Please turn to Tab 6, Plaintiff's Proposed Exhibit 6.

3 THE COURT: Are you responsible for this picture that  
4 went up of the pool?

5 THE WITNESS: Yes.

6 THE COURT: Why don't you ask about that.

7 MR. COWLEY: I will, your Honor. Before I left the  
8 topic, I did want to mark the exhibit that shows how much of  
9 the posts were made over the years.

10 THE COURT: Just go on with the posting of this  
11 picture.

12 MR. COWLEY: Your Honor, then I would like to move for  
13 the admission of Exhibit 6 like I did earlier without  
14 questioning about it, because it's not objected to. This is a  
15 list of 90 posts, and it's very relevant to serial  
16 infringement.

17 MR. SAULITIS: I need a copy of this.

18 THE COURT: What does it show, that Brown Harris  
19 Stevens is doing very well?

20 MR. COWLEY: No, your Honor. It shows serial  
21 infringement.

22 THE COURT: Serial infringement.

23 MR. COWLEY: Yes.

24 THE COURT: How does that come out of Exhibit 6?

25 MR. COWLEY: Well, your Honor, again, I don't want to

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Davidowicz - Direct

1 be the one testifying or tell a witness what to say, but my  
2 offer of proof, if you're asking for it, is, this witness has  
3 already testified at his deposition that all the content that's  
4 shown on the Talk of the Town site that was copied and taken  
5 from other sites, he simply copied, took, never asked for  
6 permission, never paid for any of it, and you'll see --

7 THE COURT: You may inquire.

8 MR. SAULITIS: My objection is that Exhibit 6 does not  
9 show a single photograph of anyone, anywhere.

10 THE COURT: Objection overruled.

11 BY MR. COWLEY:

12 Q. Mr. Davidowicz, I apologize.

13 A. That's okay.

14 Q. Looking at Exhibit 6 --

15 THE COURT: Mr. Davidowicz. Yes.

16 Q. This is a printout of the index, if you will, the list of  
17 Talk of the Town posts over the years, that you were actively  
18 maintaining it, with the one exception of the removed post that  
19 is at issue in this case, correct?

20 A. Yes.

21 Q. And so in this list --

22 MR. COWLEY: First of all, your Honor, I move to admit  
23 Exhibit 6.

24 THE COURT: Oh, it's not admitted because you haven't  
25 established relevance.



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Davidowicz - Direct

1 Q. In this list, you see the first entry where it says name of  
2 a post or an article and then it has the New York Times,  
3 December 31, 2015?

4 THE COURT: What was the process by which you quoted  
5 all these articles or printed all these articles? These are  
6 reprints, right?

7 THE WITNESS: Correct.

8 THE COURT: This is an index of reprints starting with  
9 2015 when you took over the helm, right?

10 THE WITNESS: Yeah. Well, I was always in charge of  
11 it from 2013, but this is from 2015.

12 THE COURT: This is an index of 2015.

13 THE WITNESS: Yes.

14 THE COURT: Going backwards in time starting in  
15 December and going back to September.

16 THE WITNESS: Yes.

17 THE COURT: So what was the process by which you put  
18 in these reprints?

19 THE WITNESS: Well, when I was looking for an article,  
20 I would search the internet on relevant websites for content  
21 that was appropriate for real estate topics that we would like  
22 to cover, and if I found an article that I thought was  
23 interesting and relevant and of interest possibly to viewers, I  
24 would take the article, post it into our blog, along with the  
25 link that it refers to -- actually it would be source material,

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Davidowicz - Direct

1 and identifying the source, as you can see, as in the first  
2 instance, the New York Times, and identifying the source. And  
3 what you can't see in the printout is that that text that says  
4 the New York Times was actually a hyperlink to the original  
5 article.

6 THE COURT: With regard to any of these articles, did  
7 you get permission from the source for this reprint?

8 THE WITNESS: No.

9 THE COURT: Anything further?

10 MR. COWLEY: Oh, yes, your Honor.

11 BY MR. COWLEY:

12 Q. So Mr. Davidowicz, looking at Exhibit 6, this is actually  
13 going back to May of 2013, correct?

14 THE COURT: Oh, there are successive pages.

15 A. Yes.

16 Q. The Talk of the Town blog isn't maintained where there's a  
17 new blog post today on the Talk of the Town's main website; on  
18 the website you can find this list and click on any one of  
19 these articles, correct?

20 A. Not today, no.

21 Q. This is a current printout of the list of the blog posts,  
22 is it not, sir?

23 A. Not to my knowledge. I was informed by our IT consultant  
24 that the entire blog had been pulled down from the website and  
25 that there was no content there.

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Davidowicz - Direct

1 Q. Was that after January 27, 2017?

2 A. It was after January of 2016.

3 Q. Can you see the top of this printout, January 2017?

4 THE COURT: How long were you at Brown Harris Stevens?

5 THE WITNESS: Since 2001.

6 THE COURT: And you're still there?

7 THE WITNESS: Yes, I am.

8 THE COURT: So you know what's in the blog and not,  
9 you know what's been pulled down and --

10 THE WITNESS: Well, if you go to our website, the blog  
11 is no longer there. If it's found in an archive, I'll have to  
12 check with our IT consultant who manages the websites, but this  
13 blog was originally on the home page, and if you go to our  
14 site, it is no longer there.

15 THE COURT: When was it pulled down?

16 THE WITNESS: I don't know exactly, but it was very  
17 soon after the initial complaint that we received.

18 THE COURT: From the plaintiff here?

19 THE WITNESS: Yes.

20 BY MR. COWLEY:

21 Q. Mr. Davidowicz, this list doesn't include the blog entry  
22 with The Wall Street Journal article attached, correct?

23 A. Yes.

24 Q. Because you know you have to have pulled down -- you were  
25 authorized to have it pulled down, correct?

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Davidowicz - Direct

1 A. Correct.

2 Q. But it does list all the other entries that you put in the  
3 Talk of the Town section from 2013 to 2015, correct?

4 A. I can't tell you if this is a printout so I'll have to take  
5 your word for that. I'll go back and check the website itself,  
6 because to my knowledge it is no longer there. That's what I  
7 was told by our IT consultant.

8 Q. But you can't explain why this list exists of all --

9 THE COURT: Is this list an accurate listing of all  
10 the Talk of the Town articles, reprinted items from newspapers?

11 THE WITNESS: Yes. It refers to the actual content  
12 that was originally part of the blog.

13 THE COURT: You have what you need. What more do you  
14 want?

15 MR. COWLEY: I appreciate that, your Honor. I'm just  
16 making the representation, we printed this off in connection  
17 with his deposition in January of 2017, long after they stated  
18 the blog was down and gone. That's the representation that I'm  
19 making when I'm submitting this article. This witness  
20 claims --

21 THE COURT: You're testifying.

22 MR. COWLEY: I'm not. I'm suggesting, your Honor.  
23 You're asking me to go on, and I'm trying to establish he  
24 doesn't actually know what's up or not up on that website  
25 because he seems to be making testimony that now looks like he

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Davidowicz - Direct

1 can't --

2 THE COURT: When you pulled it down, what did you do?

3 THE WITNESS: A man named Lawford, our IT consultant  
4 who manages the website, he was instructed to remove the blog  
5 in its entirety.

6 THE COURT: You instructed him?

7 THE WITNESS: Yes.

8 THE COURT: And did he report back that he removed it  
9 in its entirety?

10 THE WITNESS: Yes, he did.

11 THE COURT: Have you had occasion to look for these  
12 reprints or any of them?

13 THE WITNESS: No. They weren't of any relevance to  
14 us. There was no reason to look for them.

15 BY MR. COWLEY:

16 Q. Mr. Davidowicz, please turn three pages into the exhibit.  
17 And the dates of those articles that are listed run from the  
18 top of May 21, 2015 down to February 25, 2015. Do you see  
19 that?

20 THE COURT: The pages are numbered on the bottom.

21 MR. COWLEY: Well, they run two or three at a time.

22 THE WITNESS: Yes, I see the page.

23 THE COURT: What's the page?

24 MR. COWLEY: The third page into the exhibit, the  
25 third physical page.

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Davidowicz - Direct

1 Q. The Wall Street Journal --

2 THE COURT: Hold on. The top entry is, "Green roof  
3 options"?

4 MR. COWLEY: The top entry is, "Brown Harris Stevens  
5 launches 12 new estates on Two Trees Lane in Bridgehampton."

6 THE COURT: Okay. Got it. Fifth page in.

7 MR. COWLEY: I apologize. I'm looking at double  
8 sides.

9 BY MR. COWLEY:

10 Q. Chronologically, The Wall Street Journal article that you  
11 copied and then added the photograph at issue in this case  
12 would appear on this page but for its removal, correct?

13 A. Yes.

14 Q. You didn't instruct the person in charge of the web to take  
15 down only The Wall Street Journal article, you told him to take  
16 down the whole blog, correct?

17 A. No. That's only partially correct. His initial  
18 instruction was to remove the article that contained the  
19 photograph by Ms. Corson. Subsequent to that, at a later date,  
20 he was informed to remove the entire blog. We decided to no  
21 longer maintain the blog.

22 Q. You can't testify from your personal knowledge that all  
23 these weren't still up in January 2017 right before your  
24 deposition, can you?

25 A. No. To my knowledge they should not have been there and I

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Davidowicz - Direct

1 was told by the consultants that they were not there.

2 Q. But do you know after your deposition you looked into it  
3 and you now say they're all gone?

4 A. No. I had informed the consultant two years ago to remove  
5 it, he instructed me that he had removed it all. It was no  
6 longer there. If you go to the home page where the blog  
7 appeared, it was no longer visible, and to my knowledge no one  
8 has ever informed me that these articles were still available,  
9 and obviously we will find that out and have them removed if it  
10 is in fact true.

11 Q. One other question about the entries. You described them  
12 as being taken from other sources, but these entries that you  
13 made to Talk of the Town also included content that your firm  
14 created by itself and posted, correct?

15 A. Yes, that is true.

16 Q. So you were capable of creating your own articles on topics  
17 of interest, putting up your own content and images, correct?

18 A. That is correct.

19 Q. And this list shows a number of those entries, correct?

20 A. Yes.

21 Q. Because you could type in your blog, as you call it,  
22 correct?

23 A. That is correct, mm-hmm.

24 MR. COWLEY: Your Honor, I move for admission of  
25 Plaintiff's Proposed Exhibit 6.

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Davidowicz - Direct

1 MR. SAULITIS: Objection.

2 THE COURT: Grounds?

3 MR. SAULITIS: It is incomplete because it does not  
4 show the content, whether that hyperlink leads to anything that  
5 is actually on the web.

6 THE COURT: Overruled.

7 (Plaintiff's Exhibit 6 received in evidence)

8 BY MR. COWLEY:

9 Q. I'll ask you to turn to --

10 THE COURT: How much more do you have on this exhibit?

11 MR. COWLEY: About half an hour.

12 BY MR. COWLEY:

13 Q. Looking at what's now admitted as Exhibit 3. Sometime  
14 around March 20, 2015 you saw this Wall Street Journal article  
15 on the newspaper's website, correct?

16 A. Yes.

17 Q. You decided to copy the article and post it to the Talk of  
18 the Town section of the Brown Harris Stevens website because  
19 you believed the article fit your company's luxury market  
20 posts, correct?

21 A. Correct.

22 Q. Exhibit 5, turn to that.

23 THE COURT: Why is this necessary?

24 MR. COWLEY: To show how he did this, your Honor.

25 THE COURT: We know that's what he did. He took



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Davidowicz - Direct

1 reprints of articles that he thought were useful to him for his  
2 article on Talk of the Town for marketing Brown Harris Stevens  
3 and they did not ask for permission.

4 MR. COWLEY: He did more than that with the photo,  
5 your Honor. We can make a proffer if you'd like.

6 THE COURT: Ask him about that. Don't get caught up  
7 in the background.

8 BY MR. COWLEY:

9 Q. Mr. Davidowicz, you were the person who personally created  
10 the entry on the website that's marked as Exhibit 5, correct?

11 A. Yes.

12 Q. I'm sorry. Did you answer?

13 A. Yes.

14 Q. To create the Brown Harris Stevens post that's marked as  
15 Exhibit 5, you copied The Wall Street Journal article text,  
16 just copied and pasted directly onto the Brown Harris Stevens  
17 website, correct?

18 A. Correct.

19 Q. And as a result of that, the text of the article all went  
20 over, correct?

21 A. That is correct.

22 Q. You knew that the article on The Wall Street Journal  
23 website, because you viewed it, was accompanied by a number of  
24 photographs and a video, correct?

25 A. Yes.

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Davidowicz - Direct

1 Q. You only took one photograph of the 19 that were there and  
2 not the video, correct?

3 A. Correct.

4 Q. You decided to copy the one photo you took because it  
5 caught your eye, correct?

6 A. Yes.

7 Q. And you thought it was appropriate to go with the overall  
8 theme of the Talk of the Town blog, correct?

9 A. Yes.

10 Q. And that was Ms. Corson's photo, correct?

11 A. Yes.

12 Q. When you saw the photo on the website, you saw the  
13 photographer's credit that The Wall Street Journal had along  
14 with the photo, correct?

15 A. I probably saw it. I can't recall.

16 Q. You had to look at the photo to take the copy, correct?

17 A. Of course.

18 THE COURT: So did you notice that it was there?

19 THE WITNESS: The credit? I don't know if I was  
20 looking at it. I don't know if I noticed it.

21 THE COURT: But you expect that there would be  
22 credits.

23 THE WITNESS: Yeah. It's common practice on sites.

24 THE COURT: So you can assume that it was there.

25 THE WITNESS: Oh, yes.

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Davidowicz - Direct

1 THE COURT: So why didn't you copy that?

2 THE WITNESS: Well, it was my understanding at the  
3 time that by providing the link to the original source of the  
4 article that it was --

5 THE COURT: You saw enough to repeat the entire text  
6 and not just the reference in your Talk of the Town.

7 THE WITNESS: Yes. Again --

8 THE COURT: You didn't write the story --

9 THE WITNESS: No.

10 THE COURT: -- from scratch. You took the New York  
11 Times story and put it in whole, right?

12 THE WITNESS: Yes.

13 THE COURT: And you took in the picture whole.

14 THE WITNESS: Correct.

15 THE COURT: But not the credit.

16 THE WITNESS: Right. Yes.

17 THE COURT: Did you think you were slighting the  
18 creator of that or the photograph?

19 THE WITNESS: I didn't think so, because again, we  
20 linked to the original source of the article.

21 THE COURT: But you were reprinting; you're not  
22 looking so much to the hyperlink. You're telling them, here,  
23 here it is, here's the whole thing.

24 THE WITNESS: Yes, but this is a purely digital format  
25 and it's very similar to what The Wall Street Journal offered.

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Davidowicz - Direct

1 THE COURT: A pure digital format, and you're copying.  
2 There's no more effort to copy the source, the creator.

3 THE WITNESS: Well, in the structure of the blog, the  
4 way it was presented to me, if you use -- there was no space  
5 for a credit along with the picture.

6 THE COURT: So you simply left it out.

7 THE WITNESS: Yes. Otherwise, I'm not sure where it  
8 would have went.

9 THE COURT: You could have added your own editorial  
10 credit, couldn't you?

11 THE WITNESS: Well, I could add it to the text  
12 possibly of the article, but it's my -- again, my thinking at  
13 the time that to be faithful to the original source, I didn't  
14 want to change it or edit it in any way.

15 THE COURT: You thought that was the attribution.

16 THE WITNESS: Yes, sir.

17 THE COURT: All right. Lunchtime?

18 MR. COWLEY: Thank you, your Honor.

19 THE COURT: I have an issue on a violation of  
20 supervised release that we'll take at 2:30. So can you come  
21 back at 2:45. We can resume then. Clear the tables, please.

22 MR. COWLEY: Thank you, your Honor.

23 THE COURT: Mr. Davidowicz, you're a witness here,  
24 you're not a party, so I instruct you not to talk to anyone  
25 about the case during lunchtime.

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Davidowicz - Direct

1 THE WITNESS: Okay. Understood.

2 THE COURT: Okay?

3 (Luncheon recess)

4 AFTERNOON SESSION

5 2:48 p.m.

6 THE COURT: Mr. Davidowicz, come on up. Let's go back  
7 to work.

8 I remind you that you're still under oath.

9 And where were we? I think it's your turn,  
10 Mr. Saulitis?

11 MR. COWLEY: I have not completed, your Honor.

12 THE COURT: You have not completed. It must have been  
13 wishful thinking.

14 All right, Mr. Cowley. Go ahead.

15 BY MR. COWLEY:

16 Q. Mr. Davidowicz, prior to the lunch break we were talking  
17 about --

18 THE COURT: Louder, Mr. Cowley.

19 MR. COWLEY: I apologize.

20 THE COURT: Louder.

21 BY MR. COWLEY:

22 Q. Mr. Davidowicz --

23 THE COURT: Forget the microphone. Project your  
24 voice. You're a trial lawyer. Project your voice.

25 BY MR. COWLEY:

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Davidowicz - Direct

1 Q. Mr. Davidowicz, prior to the lunch break you were talking  
2 about the steps you took to copy The Wall Street Journal  
3 article, paste it on the Talk of the Town section of the Brown  
4 Harris Stevens blog. When you completed that step, no  
5 photograph that was on The Wall Street Journal site  
6 automatically came over and was on your website, correct?

7 A. Correct.

8 Q. You had to take additional special steps to go back and get  
9 a photograph to put up on your website, correct?

10 A. That's correct.

11 Q. So you went back to The Wall Street Journal site and  
12 copied -- selected Ms. Corson's photograph for copying,  
13 correct?

14 A. Yes.

15 Q. You copied it to your computer at Brown Harris Stevens,  
16 correct?

17 A. Yes.

18 Q. And you put it in a software program that Brown Harris  
19 Stevens created in order to put images up on its website,  
20 correct?

21 A. Yes.

22 Q. And then you used that software program to upload the image  
23 directly to the website from there, correct?

24 A. It was a single step, yes, to upload the photo.

25 Q. But it was different because it wasn't automated as a

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Davidowicz - Direct

1 single step was with the text of The Wall Street Journal  
2 article, correct?

3 A. Yes.

4 Q. You knew you could have just left the Talk of the Town blog  
5 post concerning The Wall Street Journal's  
6 hundred-million-dollar spec house article with the text of the  
7 article and your hyperlink back to The Wall Street Journal,  
8 correct?

9 A. Yes.

10 Q. But you preferred to have the photo accompanying it?

11 THE COURT: Why are we delaying this? Make your  
12 point. Move on. It's not a deposition.

13 Q. Mr. Davidowicz, you never conferred with the IT person for  
14 Brown Harris Stevens who handled the software program you used  
15 to determine if it was possible to also include a  
16 photographer's credit, correct?

17 A. Not to my recollection, no. But there wasn't a field for  
18 such a thing.

19 Q. You never --

20 THE COURT: What do you mean there was no field for  
21 such a thing? It's part of the picture.

22 THE WITNESS: In the WordPress template that we used  
23 for the blog, there was a -- an item for the title, the link to  
24 the article, the body of the text, and an image, but there  
25 wasn't a separate field to put a caption next to the

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Davidowicz - Direct

1 photograph.

2 THE COURT: So you took another step; you took the  
3 picture. With the picture you could have taken the credit  
4 below the picture.

5 THE WITNESS: No, not in the structure that we were  
6 using the --

7 THE COURT: Why?

8 THE WITNESS: The way it was built, there was no field  
9 for the caption. The picture alone is loaded into the picture  
10 frame, but there isn't a separate --

11 THE COURT: Yes, but it's attached to the picture.  
12 There's a notice underneath it about who creates it. It's part  
13 of the picture. You see it when you look at the photograph.

14 THE WITNESS: On The Wall Street Journal it is, but  
15 when you copy the picture, the credit doesn't come along with  
16 it.

17 THE COURT: It's hard for me to believe that.

18 THE WITNESS: Oh, it's true. Otherwise it would have  
19 been there. I didn't alter the photo at all. I simply copied  
20 the photo onto the hard drive and uploaded it. If the caption  
21 was all with the image, it would have been part of the image.

22 THE COURT: It's a function of how wide and how deep  
23 the picture is you're taking over. It's a jpg, isn't it?

24 THE WITNESS: It is, but --

25 THE COURT: So there's no logic that says you can't



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1 have words in a jpg.

2 THE WITNESS: No. But the jpg that was copied from  
3 The Wall Street Journal article didn't include any of the text  
4 of the caption or the photo credit on it.

5 THE COURT: I know it didn't, but it could have.

6 THE WITNESS: Well, I would have had to type it into a  
7 Photoshop program, add the caption onto the actual image  
8 itself.

9 THE COURT: Why? Why couldn't you just make a copy of  
10 the caption directly into the photograph?

11 THE WITNESS: Well, that's what I was saying. The way  
12 that the WordPress blog's template works, there was no space to  
13 put the text underneath the photo because it's just running  
14 text and it formats differently, so you couldn't put the text  
15 within the article and --

16 THE COURT: You could have pretended the text was part  
17 of the picture.

18 THE WITNESS: I mean --

19 THE COURT: Don't pictures have text in it?

20 THE WITNESS: Yes, but this one didn't. I would have  
21 had to add the text to the picture.

22 THE COURT: Just have a larger screen.

23 THE WITNESS: No, no. I would have had to alter the  
24 image to add the caption onto the image.

25 THE COURT: You need to persuade me of that,

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1 Mr. Davidowicz. That's important, because I can't believe it.

2 BY MR. COWLEY:

3 Q. Mr. Davidowicz, the software program that you were working  
4 with, that you used to add the picture, that software program  
5 was maintained by an IT specialist, correct?

6 A. Yes, using the WordPress template.

7 Q. Right. And you didn't have those IT skills, correct?

8 A. Correct.

9 Q. And you never conferred with a person that did to say, can  
10 I make it add the photographer's credit, did you?

11 A. No, I did not.

12 Q. When you took The Wall Street Journal article and  
13 Ms. Corson's photograph from The Wall Street Journal site and  
14 put them up on the Harris Stevens website, you did not first  
15 review The Wall Street Journal's licensing policy to determine  
16 if that was permitted, did you?

17 A. No, I did not.

18 Q. You never contacted anyone from the Wall Street Journal to  
19 find out if it was okay with them that you copy and post any  
20 part of their article without paying a fee, did you?

21 A. No.

22 Q. You never contacted --

23 THE COURT: You made your point.

24 Q. You never reached out to Ms. Corson to ask for any  
25 permission from her regarding her photo, did you?

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Davidowicz - Direct

1 A. No.

2 THE COURT: Let me ask you this: You were director of  
3 advertising. You want to get credit for your work, right?

4 THE WITNESS: Me personally?

5 THE COURT: Yes.

6 THE WITNESS: Yes, but not -- actually, not publicly,  
7 no.

8 THE COURT: Whatever. I mean, you want your boss to  
9 know what a good job you're doing.

10 THE WITNESS: Yes, of course.

11 THE COURT: You want the customers to know what a good  
12 job you're doing. So does it ever dawn on you that the person  
13 who took the photograph also would have liked to have the  
14 credit for her work?

15 THE WITNESS: No. Again, because I was linking  
16 directly to the source material where she gets credited, in my  
17 mind it was similar to the way people are using Facebook or --

18 THE COURT: But you said the whole point of reprinting  
19 is not just to have a reference but to have the article itself.  
20 But you know readers are not likely to use a hyperlink; they're  
21 going to read the article and move on to the next. That's why  
22 you wrote the article, right?

23 THE WITNESS: Well, we wanted to have content on the  
24 website, yes.

25 THE COURT: Did it ever dawn on you that the person

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1 who created the photographs would have liked to have had the  
2 credit for the reprinting of it?

3 THE WITNESS: No, honestly, it did not.

4 THE COURT: As you sit here today, do you think you  
5 should have?

6 THE WITNESS: Yes, obviously, yes.

7 THE COURT: Why obviously?

8 THE WITNESS: Well, after the initial complaint, it  
9 brought forth all the copyright issues that are entailed and  
10 what best practices should be.

11 THE COURT: Do you think it's a moral issue as well?

12 THE WITNESS: Personally, I don't think so, because in  
13 all honesty, I was linking -- I thought the link to the article  
14 was sufficient. I'm a photographer myself. I have access  
15 to -- we deal with professional photographers all the time, and  
16 we have thousands of photographs that we work with for the  
17 homes that we represent. We don't give photographer credits on  
18 our website to the photographs that we purchase and commission.

19 THE COURT: Because of the deal you make with the  
20 photographers, right?

21 THE WITNESS: Yes. Well, they do not stipulate --

22 THE COURT: It's not the same. Do you know if  
23 Ms. Corson had given up her rights in the deal with The Wall  
24 Street Journal?

25 THE WITNESS: No.

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Davidowicz - Direct

1 THE COURT: Go on.

2 BY MR. COWLEY:

3 Q. Photographers who you use their photos and who agree not to  
4 require credit, you pay them to use the photos, correct?

5 A. Correct.

6 Q. Can I ask you to turn to Tab 8 of the -- oh, I have to do  
7 that.

8 MR. COWLEY: May I approach the witness again, your  
9 Honor.

10 THE COURT: Yes.

11 Q. Ask you to look at Tab 8 of Plaintiff's Proposed Exhibit 8  
12 titled Computer Use Policy. Are you there?

13 A. Yes.

14 Q. That you understood was a policy of your company applicable  
15 to all employees, including yourself, correct?

16 A. Correct.

17 Q. On page 2 of the policy, there's a Section A, Ownership and  
18 Purpose. Do you see that?

19 A. Yes.

20 Q. And under that there's a number of headings. I'm going to  
21 ask you to look at the second heading, Intellectual Property.

22 You agree that in the second sentence, the company is

23 expressly -- did expressly inform employees like yourself that

24 you may not reproduce or use information received through

25 computer resources, which is the company's computers, correct?

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Davidowicz - Direct

1 A. Yes.

2 Q. That may infringe on the intellectual property rights,  
3 including copyrights, of others. Do you agree with that?

4 A. Yes.

5 Q. You were aware of that, correct?

6 A. Yes.

7 Q. It says that you will comply with all copyrights when using  
8 your computer, correct?

9 A. Yes.

10 Q. And one sentence from the end of that section, it says,  
11 you, the user, cannot copy or distribute copyrighted or  
12 otherwise restricted information from the internet. Do you  
13 agree with that?

14 A. Yes.

15 Q. The company never did discuss with you and explain to you  
16 what those copyrights required or prohibited you to do, did  
17 they?

18 A. No.

19 Q. In fact you never had any conversation with the general  
20 counsel of the company about copyrights until after  
21 Ms. Corson's complaint, correct?

22 A. Correct.

23 MR. COWLEY: Plaintiff moves for admission of  
24 Exhibit 8, your Honor.

25 MR. SAULITIS: No objection.

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Davidowicz - Direct

1 THE COURT: Received.

2 (Plaintiff's Exhibit 8 received in evidence)

3 Q. Could I ask you to turn to Tab 10. Plaintiff's Proposed  
4 Exhibit 10 is titled Brown Harris Stevens Terms and Conditions.  
5 Do you see that?

6 A. Yes.

7 Q. This is on the Brown Harris Stevens website and directed  
8 toward people who would like to use the Brown Harris Stevens  
9 website for some reason. Correct?

10 A. Yes.

11 Q. There's a section titled Copyright on the first page. If I  
12 could draw your attention to that. It claims that users of the  
13 website -- that all content on the Brown Harris Stevens  
14 website, including sales and rental information, it goes on to  
15 include photographs and other material that is subject to  
16 copyrights of third parties, constitutes content of Brown  
17 Harris Stevens. Correct?

18 A. Yes.

19 Q. Reading down under Scope of Use, users of the Brown Harris  
20 website -- strike that. I apologize.

21 That broad description of the content that's covered  
22 by this policy included your Talk of the Town section and your  
23 articles, correct?

24 A. Well, if I may, this terms and conditions of use is on the  
25 BHS USA, BrownHarrisStevens.com website, and this blog was on

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Davidowicz - Direct

1 the bshhamptons.com website.

2 THE COURT: What's the difference?

3 THE WITNESS: They're two different websites, run  
4 separately.

5 THE COURT: So all these regulations don't apply to  
6 you?

7 THE WITNESS: I'm not saying that. Just the actual  
8 document is not -- it's taken from a different website.

9 THE COURT: When someone is on the document, does that  
10 apply to them?

11 THE WITNESS: Yes, I believe so.

12 THE COURT: Yes or no?

13 THE WITNESS: Yes.

14 BY MR. COWLEY:

15 Q. It applies to users who you want to look at your content.  
16 If you go through to the Hamptons website from USA website,  
17 they agree to these terms and conditions when using the  
18 website, correct?

19 A. Yes, although there's no direct link between the two.

20 Q. This terms and conditions at Brown Harris Stevens asked its  
21 users to agree to -- specifically states that none of them  
22 could copy any content on the website, correct?

23 A. Yes.

24 Q. They can't -- I'm looking at the Scope of Use section.  
25 Brown Harris Stevens prohibits users of its website from



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1 copying, transferring, displaying, or linking to any content on  
2 its website, correct?

3 A. Yes, although --

4 Q. That's exactly what Brown Harris Stevens allowed you to do  
5 with all those other publishers whose articles you used in your  
6 Talk of the Town section, correct?

7 MR. SAULITIS: Objection.

8 THE COURT: Overruled.

9 A. Yes.

10 Q. I'd ask you to turn to the next page, 2 of 6.

11 THE COURT: Do you want to offer 10?

12 MR. COWLEY: I do, your Honor.

13 MR. SAULITIS: Objection. Grounds, best evidence.  
14 That's a Brown Harris Stevens USA document. The best evidence  
15 is the Brown Harris Stevens of the Hamptons, the separate  
16 website document that would speak for itself. That I wouldn't  
17 have an objection, but I do object to having a different,  
18 separate, nonlinked document, albeit maybe similar, but it's  
19 still not the best evidence.

20 THE COURT: Overruled.

21 (Plaintiff's Exhibit 10 received in evidence)

22 MR. COWLEY: Is 10 in, your Honor?

23 THE COURT: Yes. Proceed.

24 BY MR. COWLEY:

25 Q. If I could ask you, Mr. Davidowicz, to turn to the second

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Davidowicz - Direct

1 page of Exhibit 10, under the caption Violations of Terms and  
2 Conditions of Use. Do you see that?

3 A. Yes, I do.

4 Q. In this section Brown Harris demands that its users of its  
5 website agree that if they copy any content from its website or  
6 link to it as prohibited on the first page, that they would owe  
7 Brown Harris Stevens \$20,000, correct?

8 A. That is what it says.

9 THE COURT: Where is that, Mr. Cowley?

10 MR. COWLEY: Page 2 of Exhibit 10, the third from the  
11 bottom caption, called Violations of Terms and Conditions of  
12 Use. Last sentence.

13 Q. So if a user --

14 THE COURT: That applies only to people on the  
15 document.

16 MR. COWLEY: Copying anything from their website.

17 THE COURT: But it applies only to people who are  
18 signatories to this document.

19 MR. COWLEY: Which is all the users who have to click  
20 through on the terms and conditions of use of the website.

21 THE COURT: I don't think it's relevant.

22 BY MR. COWLEY:

23 Q. Within Brown Harris Stevens you did not get permission to  
24 take down Ms. Corson's photograph and The Wall Street Journal  
25 article until after Ms. Corson complained, correct?

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Davidowicz - Direct

1 A. Yes.

2 Q. So it wasn't already down from the website in March or  
3 April of 2015, was it?

4 A. No. As soon as we received the complaint, that's when it  
5 was initiated.

6 Q. Brown Harris Stevens does not track data concerning  
7 visitors to its website in a way that will permit it to  
8 identify someone who views an article in your Talk of the Town  
9 blog and then goes on to --

10 THE COURT: Why do we worry about the policy of Brown  
11 Harris Stevens?

12 MR. COWLEY: Your Honor, the argument is that we're  
13 supposed to be limited in our statutory damages because we  
14 haven't established a high profit earned by this defendant.  
15 I'm trying to establish in the record that that's what --

16 THE COURT: Brown Harris' profits are not relevant to  
17 the plaintiff's entitlement. It doesn't set up any standard.  
18 It's just Brown Harris. Move on, please.

19 MR. COWLEY: Your Honor, my only offer and proffer is  
20 that if they're arguing that our inability to prove that they  
21 obtained big profits because they don't track the customers'  
22 use, so we can't show their profits --

23 THE COURT: Move on to the next subject.

24 BY MR. COWLEY:

25 Q. Mr. Davidowicz, Brown Harris Stevens' lawyer on this

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Davidowicz - Direct

1 litigation throughout has worked for the company on a retainer,  
2 correct?

3 THE COURT: What's the relevance?

4 MR. COWLEY: On willfulness, your Honor. Their  
5 argument in the proposed statement of fact is we've tried to  
6 drive up attorney's fees. Our argument is exact counter, that  
7 they are --

8 THE COURT: I'm sorry. I have to take this.

9 (Recess)

10 (In open court)

11 THE COURT: Sorry, folks. Please continue.

12 MR. COWLEY: Your Honor, you asked me to explain the  
13 relevance of my prior question. Do you want me to explain it?  
14 Do you recall what the question was?

15 THE COURT: I don't know what facts. You're  
16 prosecuting the lawsuit.

17 MR. COWLEY: The relevance, your Honor, under the  
18 statutory damages, one of the purposes of statutory damages is  
19 determinative. Obviously the company that has set it up so  
20 that they pay nothing to defend infringement has left  
21 themselves in the best position as possible to risk serial  
22 infringement. That requires --

23 THE COURT: They're a major realtor. They had  
24 lawyers. They know about lawyers. They know about suits.  
25 They sue all the time, they defend all the time. What more do

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Davidowicz - Direct

1 I need to know?

2 MR. COWLEY: All I'm suggesting, your Honor, is he  
3 didn't answer the question. I don't know if he's going to  
4 answer the question or not.

5 MR. SAULITIS: There's an objection to it.

6 THE COURT: Objection sustained.

7 BY MR. COWLEY:

8 Q. Mr. Davidowicz, one last question about Exhibit 10, as to  
9 style on that exhibit.

10 A. Yes.

11 Q. Very first line under Terms and Conditions of Use, it says,  
12 "Welcome to the Brown Harris Stevens website. Brown Harris  
13 Stevens and its affiliated companies," which it then has a  
14 definition, couple definitions. Brown Harris Stevens of the  
15 Hamptons is an affiliated company of Brown Harris Stevens?

16 THE COURT: They're a separate company and no other  
17 defendant is in the case, and if you have a judgment, if you  
18 win a judgment, they'll be able to stand for it. No more.

19 Are you finished?

20 MR. SAULITIS: Your Honor, in terms of the process  
21 here, if the plaintiff rests here, then I would be happy to  
22 consolidate my cross and my direct for the witness.

23 THE COURT: Mr. Cowley, what about it?

24 MR. COWLEY: I have no further witnesses, your Honor.

25 THE COURT: Okay. That's fine. Plaintiff rests?

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Davidowicz - Cross

1 Plaintiff rests, Mr. Cowley?

2 MR. COWLEY: Yes, your Honor. I may need to rebut,  
3 have rebuttal questions of this witness or have a rebuttal  
4 witness.

5 THE COURT: You'll have cross-examination when  
6 Mr. Saulitis puts on his case.

7 Okay. Your case.

8 CROSS-EXAMINATION

9 BY MR. SAULITIS:

10 Q. Good afternoon, Mr. Davidowicz. Tell us --

11 THE COURT: So now you're doing a direct examination.

12 MR. SAULITIS: Yes, this is going to be direct  
13 examination.

14 THE COURT: Okay. Combined with the cross.

15 MR. SAULITIS: Okay.

16 Q. By whom are you currently employed?

17 A. Brown Harris Stevens of the Hamptons.

18 THE COURT: Loud, please.

19 THE WITNESS: Oh.

20 A. Brown Harris Stevens of the Hamptons.

21 Q. And is the full name of that company Brown Harris Stevens  
22 of the Hamptons, LLC?

23 A. Yes, it is.

24 Q. Have you ever been employed by Brown Harris Stevens,  
25 without the --

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Davidowicz - Cross

1 THE COURT: What's the difference?

2 MR. SAULITIS: They are separate, distinct companies.

3 THE COURT: So what?

4 MR. SAULITIS: Separately managed, separately owned.

5 THE COURT: So what? So what?

6 MR. SAULITIS: To make sure that matters that are  
7 suggested on the part of a separate company in this case not be  
8 confused with the company of --

9 THE COURT: What's going to hang on that,  
10 Mr. Saulitis? If there's a judgment against your client,  
11 there's a judgment against your client. No other defendant is  
12 sued.

13 MR. SAULITIS: Right. I recognize that, your Honor.  
14 It's just that the question of willfulness --

15 THE COURT: There's plenty of willfulness in what has  
16 been done by Brown Harris Stevens of the Hamptons, LLC.

17 MR. SAULITIS: I just want to be --

18 THE COURT: Whatever happens to other companies does  
19 not count, does not matter.

20 MR. SAULITIS: Okay.

21 BY MR. SAULITIS:

22 Q. Now have you ever been employed in the past by any other of  
23 the so-called affiliated companies, Terra, Brown Harris  
24 Stevens, LLC, Halstead Properties, or any other company in that  
25 family?

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Davidowicz - Cross

1 A. No.

2 Q. Can you take us back a little bit.

3 What is your educational background?

4 A. I graduated from Temple University in Philadelphia with a  
5 bachelor's degree in communications, in 1990.

6 Q. And after Temple, can you tell us what -- please summarize  
7 your employment history since that time.

8 A. I worked a number of jobs in the years after graduation. I  
9 worked as a photo lab technician in a photo lab in New City,  
10 New York, for a few years.

11 Q. What does a photo lab technician do?

12 A. This is back in the day of film, actual film photography,  
13 so it largely entailed processing and developing and printing  
14 film and developing slides as well.

15 Q. This was in a dark room.

16 A. Pretty much. Large machines, and in the dark room.

17 Q. And what next after that stint did you do?

18 A. Let's see. I worked in New York City at the Guggenheim  
19 Museum for a few years as a gallery guard, and after that I  
20 worked for the New York Public Library as a librarian in  
21 training.

22 Q. So as a gallery guard, you stood guard so people would  
23 behave?

24 A. Pretty much. It was -- also entailed sort of being a  
25 docent as well, talking about the artwork that was on display



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Davidowicz - Cross

1 to visitors that came in each gallery.

2 Q. And after the Guggenheim, what came next?

3 A. The New York Public Library here in Manhattan, as a  
4 librarian in training.

5 Q. And how long -- what period of time were you in the public  
6 library?

7 A. I think it was about two and a half years.

8 Q. And what next?

9 A. That's when my wife and I moved to Long Island and I worked  
10 at the Parrish Art Museum as a database manager and assistant  
11 to the development director.

12 Q. And over what period of time did you work for the Parrish  
13 Museum?

14 A. That was about two years, maybe two and a half years.

15 Q. And next after that?

16 A. Then I worked for Dunemere Associates, which was a company,  
17 real estate company that was subsequently purchased by -- about  
18 three years after that by Brown Harris Stevens.

19 Q. So this Dunemere organization, where was that located?

20 A. It's solely in the Hamptons. It was -- my office was in  
21 East Hampton, but they owned offices in Southampton,  
22 Bridgehampton, and Sag Harbor.

23 Q. Was that a small, medium, or large real estate brokerage  
24 operation?

25 A. Large for the Hamptons. Overall it's a small-ish to

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Davidowicz - Cross

1 medium-sized company.

2 Q. What did you do for that organization?

3 A. I began as a -- what was called an advertising coordinator,  
4 and like the name sounds, I was organizing, placed advertising  
5 in newspapers, magazines, wrote ad copy, and arranged  
6 photography and all the services involved with advertising,  
7 marketing properties.

8 Q. So all the advertising involved was for real estate  
9 offerings that the company had?

10 A. Yes. For rent or sale, yeah.

11 Q. And when did that company get acquired by Brown Harris  
12 Stevens of the Hamptons, LLC?

13 A. It was in early 2004.

14 Q. And since that time have you been employed by Brown Harris  
15 Stevens of the Hamptons?

16 A. Yes.

17 Q. So tell us what -- from the beginning of your employment  
18 with Brown Harris Stevens of the Hamptons up until -- have you  
19 held any other positions other than the one you currently have?  
20 Just tell us your background through, you know, your tenure  
21 with the company.

22 A. Yeah. Essentially been the same position. The position  
23 has grown along with the size of the company and the size of  
24 the marketing department and the amount of advertising and  
25 marketing we do, so I'm in charge of the promotion and

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Davidowicz - Cross

1 advertising of all the properties in the Hamptons, and we have  
2 several smaller offices now as well. It's a little bit larger.

3 Q. And did there come a time when Brown Harris Stevens of the  
4 Hamptons put together a website for use?

5 A. Yes. We always had a website. It's gone through several  
6 iterations and designs over the years.

7 Q. And what, if anything, was your involvement with that  
8 website? And if you can, include the time frames involved.

9 A. Well, the most recent was in early -- well, started in 2012  
10 but it was developed in 2013, so the current basic format was  
11 done then, and myself, our IT consultant, Walfrid Lundborg, who  
12 had actually did the programming, and hosting of the website,  
13 as well as my immediate managers in the Hamptons together as a  
14 team worked on the overall design and layout and scope of the  
15 website.

16 Q. And who did the coding for the website?

17 A. Walfrid Lundborg did.

18 Q. And at some point in time did the website contain the Talk  
19 of the Town blog?

20 A. Yes.

21 Q. For those of us who aren't as internet savvy, what is a  
22 blog?

23 A. A blog, abbreviation for a weblog, is sort of like a online  
24 diary or reporting so you can basically post information, post  
25 photographs, articles, links to articles, that are contained

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Davidowicz - Cross

1 and archived, so however frequently you do it, the main article  
2 appears prominently and then when a subsequent article gets  
3 posted, that goes into the archive, where it's listed by its  
4 title and is available for future reference, but it's no longer  
5 prominently visible.

6 Q. In simplest terms, how is a blog different from, say, my  
7 Facebook page?

8 A. It's just a variation of the same concept of posting  
9 articles or information, and in fact there's -- it falls under  
10 the rubric of social media in general, where people share  
11 information and share articles and obviously photographs as  
12 well.

13 Q. So the same way if I see an article in ESPN or Sports  
14 Illustrated or New York Times and I want to share it with my  
15 Facebook friends --

16 THE COURT: I think we've learned about blogs. Let's  
17 move on.

18 Q. Okay. Now what were your specific duties and  
19 responsibilities with respect to the Talk of the Town blog?

20 A. Basically finding content and placing it on a fairly  
21 regular basis to keep it somewhat fresh so the information  
22 doesn't get too stale.

23 Q. How did you go about finding such content?

24 A. Basically, unless there was something very specific to the  
25 company that we created original content, it was -- it would

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Davidowicz - Cross

1 have been perusing the internet websites that are likely to  
2 have content that is related to real estate and the real estate  
3 market, whether it be design, architecture, or just nature of  
4 the market conditions.

5 Q. How did you come across The Wall Street Journal article  
6 that ultimately wound up in the blog?

7 A. Basically just going directly to The Wall Street Journal  
8 website and to the real estate section and seeing the article  
9 and reading it and thinking it was relevant to, you know, our  
10 topics that we post about.

11 Q. In doing that, did you have a paid subscription to the Wall  
12 Street Journal?

13 A. No, I did not. In fact, when I --

14 Q. Did the company -- or where you found the article, did you  
15 find the article through a company paid subscription to the  
16 Wall Street Journal?

17 A. No, I did not.

18 THE COURT: Did you ever?

19 THE WITNESS: No.

20 THE COURT: You just found it.

21 THE WITNESS: Yes. In fact, when choosing articles  
22 for the blog, I specifically looked for articles that did not  
23 require a sign-in because I didn't want to have that layer to  
24 impede anybody viewing the article from the link, and that's  
25 why I never --

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1 THE COURT: You didn't want The Wall Street Journal to  
2 know you might be reprinting their articles?

3 THE WITNESS: No, no, no. All I meant is, anyone who  
4 would click on the link could view the original article,  
5 shouldn't have to log in if they didn't have an account. They  
6 should be able to read the article in its entirety without  
7 being required to log in.

8 THE COURT: Logging in would have identified you.

9 THE WITNESS: I would assume so. The thinking was --

10 THE COURT: And doing what you were doing didn't  
11 identify you.

12 THE WITNESS: Not me per se. I was thinking of the  
13 viewers of the blog who would click on our link. We didn't  
14 want them --

15 THE COURT: By going in the way you did and getting  
16 the day's headlines, you didn't identify yourself.

17 THE WITNESS: No. They have my IP address. They  
18 could identify me that way.

19 THE COURT: If they wanted to, they could research to  
20 find it, but you wouldn't identify yourself.

21 THE WITNESS: No.

22 BY MR. SAULITIS:

23 Q. When you access The Wall Street Journal's web page, you  
24 open yourself up to having a cookie implanted on whatever  
25 computer you're using, aren't you?

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1 A. Yes.

2 Q. You're thus accepting an identifier that allows, say, The  
3 Wall Street Journal to find you for purposes of advertising,  
4 isn't that correct?

5 A. Correct.

6 Q. And did you access The Wall Street Journal in any different  
7 way than anybody who goes on the internet accesses The Wall  
8 Street Journal without a paid subscription?

9 A. No.

10 Q. Now once the --

11 THE COURT: Are you regularly getting The Wall Street  
12 Journal? Do you regularly get The Wall Street Journal?

13 THE WITNESS: The office gets a subscription to the  
14 print version.

15 THE COURT: Do you follow it?

16 THE WITNESS: I usually read it online rather than the  
17 print version.

18 THE COURT: You have a subscription?

19 THE WITNESS: Not anymore. I had in the past.

20 THE COURT: 2013?

21 THE WITNESS: Again, I had never used a login at work.  
22 I had a personal subscription, but in my office, I was just  
23 careful to never be logged in because I didn't want to use  
24 anything that, again, would require a user to log in where they  
25 may not have access to it if they didn't have an account.

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Davidowicz - Cross

1 THE COURT: Go ahead.

2 BY MR. SAULITIS:

3 Q. Now when the article caught your eye, what exactly did you  
4 do next with respect to the blog?

5 A. Well, using the standard copy-and-paste tools, I copied the  
6 text of the article and the headline of the article as well as  
7 the URL of the article and pasted those into the forms on the  
8 blog of bhshamptons.com.

9 Q. When you say URL, you mean Uniform Resource Locator that is  
10 located in a field on the upper portion of your computer?

11 A. Correct, that's the link, and to the original source  
12 article.

13 Q. Is that also known as a hyperlink?

14 A. Yes, one could link to the text, yes.

15 Q. You did the same thing that you see and you put it into a  
16 place where somebody else could see exactly the same thing that  
17 you see, correct?

18 A. Correct.

19 Q. Now you mentioned something called WordPress. What is  
20 WordPress?

21 A. WordPress is a software program that provides a variety of  
22 templates for people to create their own websites.

23 Q. Is it something like Microsoft Word or Adobe Acrobat, it's  
24 something you go out and it's commonly available for --

25 A. Yes. It's one of the most, if not the most, popular



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1 program to create websites for people who aren't doing all the  
2 coding themselves. It makes it easier to use a variety of what  
3 they call widgets, different programs that you can add in, like  
4 a blog.

5 Q. Is it also referred to as web publishing software?

6 A. Yes, I believe so.

7 Q. And --

8 THE COURT: Why do I need to know all this?

9 MR. SAULITIS: Because there were -- the witness was  
10 describing special features that he used or could not use in  
11 his direct testimony, and I want the record to be crystal  
12 clear --

13 THE COURT: The record's got to be crystal clear about  
14 relevant evidence. This is not relevant evidence. All it  
15 shows to me is it was very easy to copy, which may have a  
16 bearing on willfulness, but this is not a point you want to  
17 bring up.

18 MR. SAULITIS: I want the witness to address the  
19 point.

20 THE COURT: So let him. Ask the right question.

21 BY MR. SAULITIS:

22 Q. Now in performing the act of transferring the article onto  
23 the blog, what steps -- what did you do, using WordPress?

24 A. As I mentioned, the WordPress -- WordPress template for the  
25 blog contained a field for the title, a field for the source,

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1 in this case would be The Wall Street Journal, and a linked  
2 field for the hyperlink or the URL, a field for the body of the  
3 text, and then the ability to upload an image as well, and  
4 those are the basic functions available in that template.

5 Q. Now in the thing on The Wall Street Journal, the original  
6 source, there is somewhere an attribution to the photographer  
7 near the photograph itself, isn't there?

8 A. Yes.

9 Q. And if one wanted to put that information or that layer, if  
10 you will, onto a blog, how would one do that using WordPress?

11 A. Well, in the version that we were using, it wasn't readily  
12 available. I would have to basically type in that information.  
13 There's no ability to copy it directly because the structure of  
14 how it formatted in The Wall Street Journal doesn't carry over  
15 any other way, but there was no field to do that in the  
16 WordPress template, so again, I would have to probably type it  
17 in somewhere within the body of the text, but then it wouldn't  
18 appear next to the photograph. It would be just somewhere in  
19 the body of the text.

20 Q. And why didn't you --

21 THE COURT: What did you have to do to capture the  
22 picture?

23 THE WITNESS: The picture itself and the caption  
24 exist -- even though they may appear as one image on The Wall  
25 Street Journal site, they're actually not a single image. So

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1 the photograph -- as I copied the photograph, it didn't copy  
2 the caption information.

3 THE COURT: Well, just take the photograph. How,  
4 physically, do you do that? You run your cursor over the  
5 photograph?

6 THE WITNESS: Exactly.

7 THE COURT: And it created an outline of what you want  
8 to copy?

9 THE WITNESS: Basically, right. You hover over it.

10 THE COURT: What happens if you add another half inch,  
11 and copy the attribute as well?

12 THE WITNESS: It wouldn't work that way, because  
13 you're copying --

14 THE COURT: The whole computer would collapse,  
15 correct?

16 THE WITNESS: No, no. It just doesn't capture that  
17 information. You don't outline it because you're copying it  
18 from the website, so if you right click and say save image --

19 THE COURT: What would happen if the source or the  
20 creation was inside a painting, for example, of Jackson  
21 Pollock?

22 THE WITNESS: If it was literally part of the image,  
23 it would come with it.

24 THE COURT: So enlarge the image and capture the  
25 source.

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1 THE WITNESS: Yes, but in this case the text is not  
2 part of that image. It doesn't copy it.

3 THE COURT: Simply by enlarging it, wouldn't it?

4 THE WITNESS: No. It doesn't come with the image is  
5 what I'm saying. You can actually try it. If you right click  
6 and save the image, it doesn't carry across. Otherwise it  
7 would certainly be there.

8 THE COURT: So if Ms. Corson had put her name inside  
9 the photograph itself, you would be able to capture it, but  
10 putting it below it, you can't capture it.

11 THE WITNESS: Right. They call it a watermark if you  
12 put it on the image itself, and some people do that so if you  
13 do copy the image, it would come across with it.

14 THE COURT: Okay. I understand.

15 BY MR. SAULITIS:

16 Q. Now the article itself contains a by line, literally, by  
17 Candace Jackson, The Wall Street Journal. Did you see the by  
18 line when you looked at the article?

19 A. I'm sure I did.

20 Q. That would be the author of the article, correct?

21 A. Correct.

22 Q. What if anything did you do to make sure the by line was  
23 transferred to the image on the blog?

24 A. I'd have to refer to the image itself, but --

25 Q. Exhibit 5 I think is a -- if you have Exhibit 5, you can

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1 refer to that in the book in front of you.

2 A. Okay. So that was -- the same as when copying the text  
3 above it, using the copy-and-paste tools directly and --

4 THE COURT: So where it says, "By Candace Jackson, The  
5 Wall Street Journal," you could have had another line which  
6 would have said, "Photograph by Lisa Corson."

7 THE WITNESS: Yes, that would have been possible.

8 THE COURT: You could have done that.

9 THE WITNESS: I could have.

10 BY MR. SAULITIS:

11 Q. But doing so, would you have been altering the layout of  
12 the original article?

13 MR. COWLEY: Objection to form, your Honor.

14 THE COURT: Go ahead, sir. Overruled.

15 A. Yes.

16 THE COURT: You would have?

17 THE WITNESS: Yes.

18 THE COURT: So this article has the first sentence,  
19 "Developers aim for new highs and high prices for speculatively  
20 built homes. By Candace Jackson, Wall Street Journal." In the  
21 original, would that attribution be above the text?

22 THE WITNESS: The Candace Jackson part?

23 THE COURT: Yes.

24 THE WITNESS: I don't think -- I think the "Developers  
25 aim for new highs" was like a subheadline.

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1 THE COURT: The headline.

2 THE WITNESS: It was a subheadline to the headline,  
3 which was "The race to the \$100 million spec house," and  
4 then --

5 THE COURT: So did you realign anything when you  
6 copied this?

7 THE WITNESS: Not in -- only in the sense that a web  
8 page, depending on how you view it, will move text around, but  
9 I don't believe so. I tried to keep the same structure and  
10 order of the information.

11 THE COURT: I notice you deleted the date. The  
12 original, which you can see on Exhibit 3, has italicized text  
13 for the name Candace Jackson and followed by a date, March 19,  
14 2015.

15 THE WITNESS: Right. Well, we did have the date next  
16 to the -- underneath "The race to the 100 million spec house."

17 THE COURT: So you moved it.

18 THE WITNESS: I guess so.

19 THE COURT: You manipulated the text. And you changed  
20 italics to Roman.

21 THE WITNESS: Yes.

22 THE COURT: You admitted to it.

23 THE WITNESS: Apparently.

24 THE COURT: Apparently. And it would have been a  
25 simple matter to put in, "Photograph by Lisa Corson."

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1 THE WITNESS: Yes, if I thought it was necessary, then  
2 I would have done that, but --

3 THE COURT: If you thought it was necessary.

4 THE WITNESS: Yes.

5 THE COURT: How about if you felt it was fair?

6 THE WITNESS: Yes.

7 THE COURT: If you thought it was moral, you would  
8 have done that too?

9 THE WITNESS: I would have, yes.

10 BY MR. SAULITIS:

11 Q. Now in terms of the picture itself, the photograph, did you  
12 alter -- other than size, did you alter the photograph in any  
13 way at all?

14 A. No.

15 Q. In terms of the -- now you mentioned the -- where on  
16 Exhibit 5 --

17 THE COURT: Well, that's not quite true, is it?  
18 Because the original, if you look at Exhibit 3, puts it under  
19 text and above text, but it doesn't have text to the right of  
20 it.

21 THE WITNESS: Correct.

22 THE COURT: So you eliminated that also.

23 THE WITNESS: Well, yes, by printing -- the article of  
24 the online version doesn't actually capture the way it looks  
25 visually. I don't believe this is how -- the way -- how it

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1 appeared online. The printing of the online version changes  
2 the layout as well.

3 BY MR. SAULITIS:

4 Q. Now if you can refer to Exhibit 5, can you just point out  
5 as best you can where the hyperlink to the original article is  
6 actually found.

7 A. The italic words underneath "The race to the 100 million  
8 spec house" versus "The Wall Street Journal," that is the  
9 hyperlink.

10 Q. And how does one know that from looking at the picture?

11 A. Well, online, it's more obvious, but also, if you see to  
12 the right of it, there's a little graphic, a green square, with  
13 a little white kind of squiggle line there, that indicates that  
14 there is a hyperlink there or the ability to share that  
15 information.

16 Q. And when you click on that hyperlink right after you post  
17 it, what happens?

18 A. It opens in another window the article in The Wall Street  
19 Journal, on The Wall Street Journal's website.

20 Q. Do you have to do any other navigation other than clicking?

21 A. No.

22 Q. And do the picture or pictures that are in the original  
23 article come into view, including their attribution?

24 A. Yes. From what I recall, it's a slide show that rotates.

25 Q. Taking you back to where you started from.



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1 A. Correct.

2 Q. Now how long did the article, did the blog article remain  
3 visible on the Brown Harris Stevens website after you posted it  
4 there?

5 A. I'm not sure when the next -- I'd have to refer to the  
6 other exhibit, when the next item in the blog was posted, but  
7 basically this is what's considered the home page of Talk of  
8 the Town, and only the current article is readily visible there  
9 where the photograph is seen. When the next article would be  
10 posted, if you look to the right where it says Recent Articles,  
11 that's where this blog post would move over to, so then you  
12 would need to click on the link on the right in order to open  
13 that article. So while this archived on the website, it's no  
14 longer -- after the next blog post, it's not readily visible on  
15 the home page.

16 Q. And how soon after you posted that blog were there other  
17 postings placed on the website that would have the effect of  
18 what you just described, moving the original article down the  
19 line?

20 A. Usually within a few weeks.

21 Q. Now after you posted the blog, did you do anything else  
22 with it going forward?

23 A. No.

24 Q. Did you share it with anyone or further copy it or talk  
25 about it or anything like that?

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Davidowicz - Cross

1 A. No.

2 Q. When was the next time you heard anything about the  
3 photograph or The Wall Street Journal article on the blog?

4 A. It was January of 2016.

5 Q. And how did that come to your attention?

6 A. I was forwarded an email I believe that was directed  
7 towards Peter Turino and Babette Krolik about the initial  
8 complaint from the law firm that was --

9 Q. Who is Mr. Turino?

10 A. Peter Turino is the president of Brown Harris Stevens of  
11 the Hamptons. He's a co-owner of that part of Brown Harris  
12 Stevens of the Hamptons.

13 Q. And he's the ultimate boss of yours?

14 A. Locally, yes, and then there are bosses in the city as  
15 well.

16 Q. And who is Ms. Krolik? I don't know if we have that  
17 information.

18 A. Ms. Krolik is a general counsel for Brown Harris Stevens.

19 THE COURT: Excuse me. Exhibit 5, what's the date of  
20 Exhibit 5?

21 MR. SAULITIS: It contains the date of March 20th of  
22 2015.

23 THE COURT: But that's a reference to The Wall Street  
24 Journal.

25 MR. SAULITIS: Right. But it does not contain a date

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1 as to when the screenshot was taken.

2 THE COURT: Is the record established of the date?

3 MR. SAULITIS: I don't believe so.

4 MR. COWLEY: Your Honor, I can answer. The deposition  
5 testimony was --

6 THE COURT: It doesn't count. It's not part of the  
7 record. Thank you.

8 BY MR. SAULITIS:

9 Q. Now to continue, you heard something from Mr. Turino and  
10 Ms. Krolik on January -- is it the 4th of 2016?

11 A. Sounds right.

12 Q. What did you do in response to the communication you  
13 received from Ms. Krolik and Mr. Turino?

14 A. Well, it was actually forwarded to me from my immediate  
15 manager, who's Aspasia Comnas. She's the managing director of  
16 Brown Harris Stevens of the Hamptons and my immediate  
17 supervisor. So before -- I wanted to check with her to make  
18 sure, before we moved ahead to remove the blog article, that it  
19 was okay, I was authorized to do so. I didn't want to make it  
20 seem as if we were trying to hide anything or make believe that  
21 it wasn't there. So I wanted to be sure that it was okay to  
22 remove it. And once we got permission to do that task, Walfrid  
23 Lundborg was involved in removing it, but he was also advised  
24 to make a backup copy of it off line that would not be visible  
25 to be used as a reference.

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Davidowicz - Cross

1 Q. How quickly did you receive the permission and  
2 authorization to remove the posting?

3 A. I believe it was within 24 hours.

4 Q. And once that happened, what exactly did you do in response  
5 to that instruction?

6 A. I contacted Walfrid Lundborg to initiate the proceedings of  
7 tearing down the item from the website and making sure that it  
8 was no longer visible.

9 Q. How did you ascertain yourself, if at all, that it was no  
10 longer visible after January the 5th of 2016?

11 A. By the same link that was included in the initial complaint  
12 that was sent over, testing it to make sure that it was no  
13 longer directing to the -- to the item.

14 Q. Would it be fair to say you saw with your own eyes that it  
15 was no longer there?

16 A. Correct.

17 Q. And in the ordinary course of your work at Brown Harris  
18 Stevens of the Hamptons, is there a tool, a methodology that is  
19 available for you to ascertain whether there has been any  
20 traffic or hits on the particular blog posting, on the page  
21 that contains the blog posting?

22 A. Yes. Built in within the BHS Hamptons website are what is  
23 called Google Analytics, and it allows the ability to drill  
24 down to any page on the website to see, over any particular  
25 time period, how much traffic there was to that specific page.

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1 Q. Did you have occasion to use that with respect to the  
2 specific photo and the posting that we're talking about here?

3 A. Yes, I did.

4 Q. And did you print out a report from Google Analytics?

5 A. Yes.

6 Q. Can you turn please to Exhibit E that is in front of you.

7 THE COURT: Did you establish the date, Mr. Saulitis,  
8 when Mr. Davidowicz took down the article?

9 MR. SAULITIS: I believe it was the same day the  
10 demand was made or the next day. It was January 4th or 5th of  
11 2016.

12 THE COURT: Is that in the record?

13 MR. SAULITIS: Yes. And it's reflected in  
14 Ms. Krolik's response to Mr. Cowley via email in which the  
15 representation is made that it had already been taken down.

16 THE COURT: We're now working with Exhibit E?

17 MR. SAULITIS: Yes, your Honor.

18 BY MR. SAULITIS:

19 Q. On Exhibit E, you personally created this report in the  
20 regular course of business?

21 A. Correct.

22 Q. What is the date range of the report and the date you  
23 created it?

24 A. The date range is March 1, 2015 to March 1, 2016.

25 Q. And is that --

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1 MR. SAULITIS: I offer the document into evidence.

2 THE COURT: Why is it relevant?

3 MR. SAULITIS: Because it demonstrates that after  
4 January of 2016 there was no hit on the website, on the page --

5 THE COURT: I can't tell that from this document. You  
6 need to have some testimony on that.

7 BY MR. SAULITIS:

8 Q. Can you tell from the document in front of you whether  
9 there was any traffic onto the original location of the  
10 posting, the blog posting?

11 A. Yes, I can.

12 Q. And can you explain to the Court how you can know that from  
13 the document.

14 A. Yes. Towards the top of the page, there's a graph that  
15 goes lengthwise across the page with peaks and valleys, and  
16 that measures how many hits or views on that particular page  
17 there were from March of 2015 through March of 2016, and so you  
18 see in early March of 2015 through April, there were several  
19 peaks there of three or four views, and on subsequent days --

20 THE COURT: How do you get that?

21 THE WITNESS: You can see there is a measurement here,  
22 to line 5 and then 10, and then all of them except -- until you  
23 get to January, when the complaint was issued, where there was  
24 more activity viewing the page. So they're all under five  
25 throughout the year. October, you can see where I think the

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1 initial discovery by ImageRights occurs, you see there's  
2 another peak there, and all the subsequent views after that.  
3 So the total -- if you just move down to Page Views in the  
4 column where it's 84 all together over this span from where it  
5 was initiated to when it was taken down.

6 THE COURT: 84 different instances when that page was  
7 viewed.

8 THE WITNESS: Correct.

9 THE COURT: And it occurred back in March.

10 THE WITNESS: Yes. And then zero after January of  
11 2016.

12 BY MR. SAULITIS:

13 Q. Can you look at the item toward the middle of the page  
14 where it says Brown Harris, bhsusa.com, and it says 17. What  
15 does that tell you?

16 A. Where the original source -- before people came to our  
17 website, the source of how they found bhshamptons.com; not the  
18 blog article but how they came to our website. So at the time  
19 there was a link from BHS USA to bhshamptons.com, and 17 of  
20 those customers came from our website to the Hamptons and then  
21 subsequently this is the page with the blog on it.

22 Q. What does the line item No. 3, ImageRights.com and the  
23 number 11 tell us?

24 A. It tells us that the company that was secured by Ms. Corson  
25 to find the images visited the site 11 times.

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1 Q. So this would have included views Ms. Corson herself or  
2 ImageRights or you yourself did when taking a look at the  
3 content?

4 A. Yes, that would be the total of everyone involved.

5 MR. SAULITIS: I offer the document into evidence.

6 MR. COWLEY: No objection, your Honor.

7 THE COURT: Received.

8 That's E, right?

9 MR. COWLEY: It's not the E that was identified to us,  
10 and I don't believe that's the E in your book. It's not the E  
11 in my book.

12 THE COURT: It's E in my book. It's got a graph  
13 across the page, the top third, and it's got 16 entries below  
14 that.

15 MR. COWLEY: I'm just going by the list that you gave  
16 us.

17 THE COURT: Do you have the document?

18 MR. COWLEY: I have it as F, and I thought we gave it  
19 to you as F, but I don't know how --

20 THE COURT: Document E is received.

21 (Defendant's Exhibit E received in evidence)

22 BY MR. SAULITIS:

23 Q. Now, Mr. Davidowicz, the article itself, which is Exhibit 5  
24 here, describes a dream house on a hillside lot in Beverly  
25 Hills, California. Is it your understanding that the



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1 photographs depict the Beverly Hills, California property?

2 A. Yes.

3 Q. Do you know if that property was listed or offered for sale  
4 by Brown Harris Stevens of the Hamptons?

5 A. It was not.

6 Q. And how do you know that?

7 A. We don't have any properties for sale outside of -- Brown  
8 Harris Stevens of the Hamptons has no listings outside of New  
9 York, and Brown Harris Stevens only has offices on the East  
10 Coast. We have none in California.

11 Q. Where is Brown Harris Stevens licensed to sell real estate?

12 A. In New York City, in the Hamptons, on the North Fork in  
13 Long Island, Palm Beach, and Miami.

14 Q. None in Beverly Hills, California.

15 A. No.

16 Q. And did --

17 THE COURT: So why did you copy it?

18 THE WITNESS: Because the article itself is about  
19 luxury homes, spec homes that I thought was interesting to  
20 people who are interested in real estate.

21 THE COURT: If they move to Beverly Hills and buy the  
22 house?

23 THE WITNESS: No, not at all. It wasn't a tool to  
24 sell anything. Just like we have information about the local  
25 towns, we provide information on how to buy and sell a home, we

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Davidowicz - Cross

1 provide a mortgage calculator. It's about providing  
2 information.

3 THE COURT: To show the house.

4 THE WITNESS: And things that are of interest and  
5 hopefully capture their --

6 THE COURT: Nice pool in back. Could be built in the  
7 Hamptons.

8 All right. Go ahead.

9 BY MR. SAULITIS:

10 Q. So if I understand you correctly, this was not shown as a  
11 way to attract attention to some property that Brown Harris  
12 might wish to be a broker for.

13 A. No, certainly not.

14 Q. To your knowledge does Brown Harris Stevens of the Hamptons  
15 stand to make any money from the blog?

16 A. No.

17 MR. COWLEY: Objection, your Honor.

18 THE COURT: Overruled.

19 Q. Does Brown Harris Stevens generate any advertising revenue  
20 ever from the publication of the blog?

21 A. No.

22 THE COURT: It's a goodwill venture, right?

23 THE WITNESS: Yes.

24 THE COURT: Which we can't value.

25 THE WITNESS: No.

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Davidowicz - Cross

1 THE COURT: But obviously you wouldn't put it in  
2 unless it would add to the website of Brown Harris Stevens.

3 THE WITNESS: Correct.

4 BY MR. SAULITIS:

5 Q. And did Brown Harris Stevens directly or indirectly ever  
6 participate in the sale of the property depicted in the --

7 THE COURT: You already said that.

8 MR. SAULITIS: Sorry. I apologize.

9 Q. Now prior to your posting the picture in March of 2015, to  
10 your knowledge did Brown Harris Stevens of the Hamptons ever  
11 receive a cease and desist letter from anyone regarding  
12 anything ever posted on its website?

13 MR. COWLEY: Objection, your Honor. General  
14 counsel --

15 THE COURT: I can't hear you murmuring.

16 MR. COWLEY: There's no foundation for this. He never  
17 worked with the general counsel, never even spoke with the  
18 general counsel before this.

19 THE COURT: That wasn't the question.

20 MR. COWLEY: He would have no way of knowing.

21 THE COURT: To your knowledge did Brown Harris Stevens  
22 ever receive a cease and desist letter on anything?

23 THE WITNESS: Not to my knowledge, no.

24 THE COURT: Is this your first experience with a cease  
25 and desist letter?

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Davidowicz - Cross

1 THE WITNESS: This is my first, yes.

2 THE COURT: And in fact, you learned about it from  
3 somebody else in the company.

4 THE WITNESS: Yes.

5 THE COURT: Who may have had experience with cease and  
6 desist letters.

7 THE WITNESS: Possibly. I had it forwarded to me.

8 THE COURT: You don't know.

9 THE WITNESS: Yes.

10 BY MR. SAULITIS:

11 Q. And as director of advertising --

12 THE COURT: I think you established. This has no  
13 relevance at all.

14 Q. To your knowledge has Brown Harris Stevens of the Hamptons  
15 ever itself sent a cease and desist letter to somebody for  
16 using --

17 THE COURT: Objection is sustained.

18 Q. Has Brown Harris Stevens of the Hamptons ever brought a  
19 lawsuit to your knowledge --

20 THE COURT: Objection is sustained. I think you're  
21 finished with your cross, or direct, whatever it is.

22 MR. SAULITIS: Let me make sure of that, your Honor.

23 THE COURT: Well, you have been asking senseless  
24 questions.

25 Okay. Mr. Cowley?

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Davidowicz - Redirect

1           There's no need to ask a question if you don't have  
2 questions.

3           MR. COWLEY: I have a couple follow-up on what was  
4 just asked a moment ago about profiting in any way from the  
5 blog.

6 REDIRECT EXAMINATION

7 BY MR. COWLEY:

8 Q. You testified to and identified the tracking of where  
9 people came from to look at the blog. And that's been marked  
10 as Exhibit E. Do you recall that, sir?

11 A. Yes.

12 THE COURT: Just ask the substantive question.

13 You've tracked where people came from in looking at  
14 that blog.

15 THE WITNESS: Yes.

16 THE COURT: Because that would be possible customers  
17 for you.

18 THE WITNESS: We were looking at it to see how many  
19 visitors, not really where they were coming from, because we  
20 don't follow up on that. We're just trying to find out how  
21 many visitors there are. Very often a homeowner may ask how  
22 many people viewed their home on our website, and that's the  
23 tool we use for that.

24 THE COURT: So why were you interested in this when  
25 the building was built on spec?

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Davidowicz - Redirect

1 THE WITNESS: Not the house. I was interested in it  
2 since the complaint was made; I was curious as to how many  
3 people actually viewed the blog item, not where they came from.

4 THE COURT: Oh, you didn't do this at the time; you  
5 did this afterwards.

6 THE WITNESS: Correct, yeah. It was after January of  
7 2016. That's why I measured --

8 THE COURT: Just a matter of curiosity.

9 THE WITNESS: Yeah.

10 BY MR. COWLEY:

11 Q. The exhibit that you went over with Attorney Saulitis, it's  
12 now been marked, you didn't show in that exhibit where they  
13 went next, did you?

14 THE COURT: What's the difference?

15 MR. COWLEY: Because if they went to look at any of  
16 the listings that Brown Harris was selling --

17 THE COURT: It's goodwill. It's goodwill. That's  
18 what it is.

19 BY MR. COWLEY:

20 Q. Mr. Davidowicz -- I'm sorry. I do not intend to  
21 mispronounce your name but I clearly am.

22 THE COURT: Davidowicz.

23 MR. COWLEY: Davidowicz.

24 A. That's okay.

25 Q. You testified earlier about whether or not The Wall Street

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Davidowicz - Redirect

1 Journal article, that post was visible and for how long.

2 You're only referring in any of that testimony to someone who  
3 starts at the website main home page and looks around from  
4 there, correct?

5 A. I'm sorry. I didn't follow that.

6 Q. You testified about the --

7 THE COURT: When did he testify?

8 MR. COWLEY: In response to Mr. Saulitis' question  
9 about how long this post with the picture that's at issue here  
10 was visible.

11 Q. You were talking about visible to someone looking at the  
12 main home page, correct?

13 A. No. I was talking about the actual Talk of the -- on the  
14 main website home page, it was never visible. It was only  
15 visible on the Talk of the Town page, and only there it was  
16 visible until the next article was posted and then you had to  
17 click on the link.

18 Q. But if someone did a Google search for spec houses or  
19 popular houses or valuable houses --

20 THE COURT: Objection sustained.

21 MR. COWLEY: No further questions.

22 THE COURT: All right.

23 MR. SAULITIS: Just one follow-up question, your  
24 Honor. And I apologize. I neglected to --

25 THE COURT: Go ahead. Ask it.

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Davidowicz - Recross

1 RECCROSS EXAMINATION

2 BY MR. SAULITIS:

3 Q. Was the Talk of the Town blog itself discontinued at some  
4 point, and if so, when and why?

5 A. Yeah, it was discontinued, and I don't recall the exact  
6 date -- it was obviously after January of 2016 -- due to a  
7 number of reasons; partly because of what came to light with  
8 the potential for copyright infringement, but also, in viewing  
9 the tracking of views like we just discussed, the blog items  
10 were never a real source of much web traffic on our website,  
11 there wasn't much activity there, and it didn't warrant the  
12 amount of work involved in maintaining it anymore. So it was  
13 subsequently removed in its entirety.

14 Q. Is there any intention to bring back the blog or ever again  
15 to use The Wall Street Journal article or the photograph or any  
16 other such article?

17 MR. COWLEY: Objection, your Honor.

18 A. No.

19 THE COURT: Sustained.

20 MR. SAULITIS: Thank you.

21 THE COURT: You can step down, please.

22 THE WITNESS: Thank you.

23 (Witness excused)

24 THE COURT: Next witness.

25 MR. SAULITIS: The defense rests their portion of the



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1 case, your Honor.

2 THE COURT: The only portion then we're talking about  
3 is the issue of infringement and statutory damages. You've  
4 reserved the issue of attorney's fees for later, right?

5 MR. SAULITIS: That's my understanding.

6 MR. COWLEY: Yes, your Honor.

7 THE COURT: Okay. Both sides rest?

8 MR. COWLEY: Yes, your Honor.

9 THE COURT: Ten minutes.

10 (Recess)

11 (In open court)

12 THE COURT: Be seated, everyone.

13 These will be my findings and conclusions to end this  
14 phase of the case.

15 Plaintiff, Lisa Corson, filed this claim for direct  
16 copyright infringement under 17 U.S.C. Section 512, alleging  
17 that Brown Harris Stevens of the Hamptons, LLC infringed on her  
18 copyrighted photograph. Brown Harris has conceded that it  
19 infringed. The only issue at trial was whether the  
20 infringement was willful, and on that basis, whatever and to  
21 what extent statutory damages should be ordered.

22 I find that the infringement was willful, and I find  
23 that the conduct of indifference to the rights of others was  
24 egregious and that the statutory damages should be \$25,000.  
25 There were no actual damages.

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1 More specifically, the action was filed in this court  
2 January 25, 2016, and service was timely.

3 Plaintiff is a professional freelance photographer who  
4 lives and works in Ojai, California.

5 Defendant is a New York limited liability company and  
6 a licensed real estate brokerage firm, whose main office is  
7 located at 27 Main Street, East Hampton, New York, 11937. The  
8 defendant, with its affiliated companies, is a leading real  
9 estate brokerage firm in New York City and other areas. This  
10 particular defendant is confined, however, to the Hamptons.

11 Plaintiff worked as a photo editor for The Wall Street  
12 Journal between July 2010 and March 2013. She then developed  
13 an independent photography business but took assignments from  
14 The Wall Street Journal on a freelance basis.

15 She entered a freelance agreement, which is Exhibit 3,  
16 dated March 27, 2013, with the parent of the Wall Street  
17 Journal. Under this agreement, Corson was commissioned from  
18 time to time to shoot original photographs for use in print and  
19 online editions of the Wall Street Journal. Among its  
20 provisions was a clause that said that specific rights would be  
21 set out from time to time for her work plus reimbursement of  
22 expenses and other incidental matters.

23 On or about March 13, 2015, at the request of The Wall  
24 Street Journal, Corson was engaged to take a photo shoot of a  
25 house at 9945 Beverly Grove, Beverly Hills, California. The

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1 house was a particularly luxurious house, with a swimming pool  
2 in the background, and was being built on speculation. The  
3 article intended to use this house as an example of luxury  
4 speculative homes.

5 Plaintiff took her photo shoot in or about March of  
6 2015, spending a day in Beverly Hills and substantial time  
7 thereafter in editing the photographs selected for review by  
8 The Wall Street Journal. She was paid \$600 for the photo  
9 shoot, plus another hundred dollars for video footage, taking a  
10 \$700 fee in all. She was also reimbursed for mileage and food.

11 On March 18, 2015, plaintiff applied for and obtained  
12 a copyright registration, including these photographs.

13 A photograph, a relevant photograph, was published in  
14 the March 20, 2015 edition of the Wall Street Journal. The  
15 article was entitled "The race to \$100 million spec house."  
16 The article appeared in its print and online editions. The  
17 article was accompanied by the photograph at issue, along with  
18 three other photographs taken by plaintiff, plus photographs  
19 taken by other photographers. The particular photograph that's  
20 in issue is a photograph of the swimming pool in the back of  
21 the house showing a rather luxurious-looking swimming pool and  
22 deck. The online version of The Wall Street Journal article  
23 displayed the photograph at issue -- that is, of the swimming  
24 pool -- as part of a slide show, along with a number of other  
25 photographs and a video. Plaintiff's photograph was the 14th

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1 in a series of 19 photographs, all being a slide show that  
2 could be accessed from the media edition of The Wall Street  
3 Journal. Those who wanted to see the slide show would have to  
4 scroll through it one after the other. As I said, four of the  
5 photographs in the slide show were taken by plaintiff; the  
6 others were taken by other photographers.

7 Pursuant to a license agreement, plaintiff licensed  
8 The Wall Street Journal to use her photographs but retained  
9 ownership of the copyrights in her photographs. Plaintiff  
10 published the copyrighted photograph on her website, along with  
11 a copyright registration notice. It was to sell photographs to  
12 other users, but there was no evidence that a sale took place  
13 of the photograph in question.

14 Plaintiff testified that typical license fees could  
15 range between a hundred dollars and \$8,000. Somewhat  
16 inconsistently, the testimony was that for a cover page, a  
17 typical license fee might be a thousand dollars to \$3,000, and  
18 a full page, not a cover page, could be anywhere from \$350 to a  
19 thousand dollars. I find this testimony and these ranges too  
20 wide to really have any particular relevant value, and I find  
21 from this that plaintiff's damage was not proved, that there  
22 was no actual damage involved.

23 At the time The Wall Street Journal article was  
24 published, defendant maintained a blog within its website  
25 entitled Talk of the Town. The blog was not used to sell

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1 particular homes. It was created generally as a goodwill  
2 venture, intended to be of interest to potential buyers of  
3 luxury homes and to enhance the defendant's stature in the  
4 industry. It is part of a larger marketing set of activities.

5 Erik Davidowicz, who testified here, was the director  
6 of advertising for defendant. His habit was to search the  
7 internet for articles written and published by other entities.  
8 He then copied the entire text of an article from a third party  
9 and, through various software owned by defendant, pasted it  
10 into his blog entries, along with a hyperlink back to the  
11 original source.

12 On or about March 20, 2015, Davidowicz found The Wall  
13 Street Journal article and copied it to the Talk of the Town  
14 blog. He copied the entire Wall Street Journal article, pasted  
15 it into a Talk of the Town blog post, and made reference to The  
16 Wall Street Journal, specific reference in the form of a  
17 hyperlink to the original article. However, he did not obtain  
18 permission from The Wall Street Journal article to reprint the  
19 article, nor did he obtain clearances from any other of the  
20 sources that were depicted in the article.

21 He chose, along with the article, plaintiff's  
22 photograph with the swimming pool. In order to do it, he had  
23 to scroll through and disregard at least 13 other photographs.  
24 Presumably, he viewed and discarded all 18 of the photographs  
25 not taken. His repeat of the photograph showed no attribution.

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1 He claimed that it was not possible in the software that was  
2 used by the defendant to copy the attribution, but it's clear  
3 that with a minimum of effort, a reference could have been  
4 given. There was no reference given.

5 Defendant is a sophisticated company. It's  
6 sophisticated in all aspects of the business, and it should  
7 have known, to the extent it didn't know, that just as it seeks  
8 protection for its original activities, so others who create  
9 photographs and other creative matters have and should be  
10 expected to have interests to preserve their property interests  
11 in their creations. Davidowicz and The Wall Street Journal  
12 were oblivious to these other interests, although they clearly  
13 knew there were such a thing. I find this indifference of the  
14 rights of others to be egregious.

15 The record produced by the defendant shows that the  
16 particular blog post depicting the plaintiff's photograph was  
17 viewed approximately 84 times, 13 of which were viewed by  
18 ImageRights, an entity that plaintiff and others hired to  
19 protect copyrights by finding and identifying illegal uses of  
20 others'. Although defendant did not obtain any material gain  
21 specifically from the use of this photograph, or the reprint of  
22 the article, it cannot be said to have enjoyed any specific  
23 profit from its infringing use, nevertheless, these kinds of  
24 depictions enhanced its goodwill, the main purpose of the blog  
25 post Talk of the Town.

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1 Defendant conceded infringement from the beginning of  
2 the case. It made various offers of judgment that the  
3 plaintiff thought were inadequate and were rejected. Thus,  
4 there was substantial discovery and a one-day trial of the  
5 issues.

6 It's clear to me that plaintiff is entitled to  
7 vindicate rights not, in plaintiff's opinion, adequately  
8 compensated, and it is defendant's right to vigorously reject  
9 efforts they considered windfall damages. Thus, I blame  
10 neither party for these proceedings. Whether and to what  
11 extent the fees that were generated by prevailing party in this  
12 litigation was appropriate will be the subject of the next  
13 proceeding.

14 So first the main issue was whether defendant's  
15 infringement was willful. I find here willfulness entitles  
16 plaintiff to the enhanced statutory damages provided by 17  
17 U.S.C. Section 504(c)(2). The standard for willful  
18 infringement is not only knowledge on the defendant's part that  
19 what it did was infringement but also reckless disregard of the  
20 practice of protecting creativity, the very purpose of  
21 copyright. When the plaintiff can demonstrate, either directly  
22 or through circumstantial evidence, that defendant had  
23 knowledge that its actions constituted infringement, or  
24 recklessly disregarded that possibility, enhanced statutory  
25 damages for willful copyright infringement under 17 U.S.C.

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1 Section 504(c)(2) are appropriate. I cite *Twin Peaks*  
2 *Productions, Inc. v. Publications International Ltd.*, 996 F.2d  
3 1366, 1381-1382 (2d Cir. 1993), in a district court decision  
4 and decisions of other circuits. Another case is *Yurman*  
5 *Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 112 (2d Cir. 2001).  
6 And many cases have held reckless disregard of the copyright  
7 holder's rights suffices to warrant award of enhanced damages  
8 regarded by the copyright laws. One district court decision so  
9 holding is *Bryant v. Europadisk Ltd.* I only have a reference  
10 to the U.S. Patent Quarterly, 91 USPQ2d 1825 (S.D.N.Y.  
11 April 15, 2009). The case was affirmed by the Second Circuit  
12 2010, 603 F.3d 135, and certiorari was denied.

13 Plaintiff successfully proved that her photograph was  
14 copyright protected. It's clear that defendant, as a  
15 sophisticated business, knew there was copyright involved and  
16 did nothing to check those rights or to clear permission to  
17 reprint from the photographer.

18 The next question is what amount of statutory damages  
19 should be awarded. The Supreme Court instructs that the  
20 statutory rule formulated after long experience not merely  
21 compels restitution of profit and reparation from injury but  
22 also a desire to discourage wrongful conduct. *F.W. Woolworth*  
23 *Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

24 Court of Appeals, in its usual way, has listed  
25 criteria that a district judge can use in assessing what amount



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1 of statutory damages would be appropriate. There are a number  
2 of cases, but one case is *Psihoyos v. John Wiley & Sons*, 748  
3 F.3d 120, 126 (2d Cir. 2014). There are essentially five other  
4 cases. I spelled out the sixth. None of these factors are  
5 essential in and of themselves but are guides a district court  
6 can use. The infringer's state of mind, the expenses saved and  
7 profits earned by the infringer, the revenue lost by the  
8 copyright holder, the deterrent effect on the infringer and  
9 third parties, the infringer's cooperation in providing  
10 evidence concerning the value of the infringing material, and  
11 the conduct and attitude of the parties. *Bryant v. Media Right*  
12 *Productions, Inc.*, 603 F.3d 135, 144 (2d Cir. 2010).

13 Taking these factors one at a time, the first one is  
14 the infringer's state of mind. There may not have been an  
15 intent to infringe, but there was a disdain and indifference to  
16 the rights of others, which I find to be egregious,  
17 particularly by a sophisticated company. By and large, unless  
18 the photographer has national or international fame,  
19 photographers don't make much money and they don't have much  
20 wherewithal to vindicate their rights. I don't know the  
21 plaintiff's status, but the fact that she takes an entire day  
22 plus part of another day for editing to take a photo shoot for  
23 \$700 indicates the lack of power on the part of the plaintiff.  
24 Whether there was a secondary market, as the photographer  
25 hopes, for photographs is a speculative concern. It's a

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1 difficult business.

2 Defendant, a sophisticated company, like all other  
3 real estate companies, takes a great deal of pride in its  
4 listings and its creative work and working with clients and the  
5 like. I take judicial notice of that, and there are so many  
6 cases in this court and other courts where parties in this  
7 business seek protective orders and protection for these  
8 rights. A company involved with these rights ought to know  
9 that others are equally entitled to the enjoyment of their  
10 creative work. The way that defendant acted shows a disdain  
11 for the creative work of others, and I find that to be  
12 egregious. That's the infringer's state of mind.

13 The expenses saved and profits earned by the  
14 infringer. There were no profits earned by the infringer. The  
15 expenses saved were minimal. The cost of a license in  
16 relationship to everything else the defendant did was not a  
17 substantial expense, and so this was not something that was  
18 done to save a lot of money. There was a goodwill concern, but  
19 the main factor is other of these criteria, specifically the  
20 infringer's state of mind and the fourth criterion, the  
21 deterrent effect on the infringer and third parties.

22 Before I go on to that, I talk about the revenue lost  
23 by the copyright holder. This is speculative. Plaintiff did  
24 not sell that work to others and didn't seem to have the kind  
25 of specific knowledge of how much could be obtained for a

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1 photograph to indicate that there was any substantial profits  
2 that she obtained in the secondary market, so I can't say that  
3 plaintiff lost any appreciable amount of money. However,  
4 there's always that potential.

5 The main point put forth in the criteria is the  
6 deterrent effect on infringer and third parties. I find this  
7 the most important criterion, and on reflecting on this, I came  
8 to my award of \$25,000 of statutory damages, the least amount  
9 that I think appropriate to deter the defendant and other  
10 similarly situated third parties.

11 The fifth criterion is the infringer's cooperation in  
12 providing evidence concerning the value of the infringing  
13 material. I can't say that there was any lack of cooperation,  
14 and I can't say that anybody was forthcoming as to the issues  
15 that proved to be of main interest at the trial, so I consider  
16 that a neutral factor.

17 And sixth, the conduct and attitude of the parties.  
18 It's clear that the defendant wanted to settle from the  
19 beginning and made that clear in preliminary conferences. But  
20 that's not enough. There were two offers of judgment in the  
21 case that are public because they were filed. Is that right,  
22 Mr. Saulitis?

23 MR. SAULITIS: They've been filed with the record of  
24 this -- with the pretrial order as proposed exhibits, but they  
25 were not filed yet electronically with the court.

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1 THE COURT: But they were public in the sense of being  
2 expressed in the pretrial materials.

3 MR. SAULITIS: Yes, indeed.

4 THE COURT: Then I can reference them.

5 There was an early offer of \$3,000 and a later offer,  
6 after discovery had begun, of \$5,000. Plaintiff rejected both.  
7 I can't say that the amounts offered were sufficiently  
8 attractive that the plaintiff was unreasonable in rejecting  
9 them. It clearly was inadequate in terms of deterrent effect.  
10 The offer did not reflect any substantial interest on the  
11 defendant's part to settle the case, nor its realization that  
12 what it had done was wrong, and therefore I can't say that the  
13 conduct and attitude of the plaintiff in litigating this case  
14 was unreasonable.

15 I think I've completed the issues with regard to  
16 statutory damages.

17 Plaintiff also asks for a permanent injunction under  
18 17 U.S.C. 106, and the Supreme Court has, again, several  
19 criteria: evidence of irreparable injury; whether damages that  
20 are available at law, such as monetary damages, are inadequate  
21 to compensate for the injury; whether, considering the balance  
22 of hardships, a remedy in equity is warranted; and whether the  
23 public interest would not be disserved by a permanent  
24 injunction.

25 I don't think there is evidence of irreparable injury

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1 because there's compensation by statutory damages, and these  
2 are remedies available at law. Statutory damages, in my  
3 judgment, are adequate to compensate for any injuries suffered  
4 by the plaintiff and to provide deterrent effect to the  
5 defendant. The testimony was clear that defendant took down  
6 the infringing photograph when demand was made to take it down,  
7 and soon after that took down the entire blog which reflected  
8 its indifference to creative rights. There seems to be no need  
9 for an injunction because no need will be served. And  
10 therefore, in the balance of hardships, since there's nothing  
11 really to be gained by the plaintiff and a loss potentially  
12 sufferable by the defendant, I think that the balance favors  
13 the defendant.

14 And the public interest does not need a permanent  
15 injunction in this case. I'm convinced that defendant has  
16 learned its lesson and will not repeat its disdain for others'  
17 creative rights.

18 Mr. Cowley, are there any other findings that I need  
19 to make?

20 MR. COWLEY: Your Honor, I would like to address, at  
21 the attorney's fees level or now, if you prefer, the finding  
22 related to when the waiver of the defenses occurred, not at the  
23 beginning. You have before you --

24 THE COURT: What waiver of defenses?

25 MR. COWLEY: In your findings you stated that the

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1 defendant conceded infringement from the beginning. That did  
2 not happen. You have before you the answer --

3 THE COURT: I remember distinctly in the first  
4 pretrial conference in this case the defendants admitted  
5 infringing. I think there may have been some reservation  
6 language and the like, but I don't think there was a waiver of  
7 any defenses. And when the answer came, what did the answer  
8 say?

9 MR. COWLEY: They asserted fair use license and lack  
10 of copyright. We had to litigate all of those defenses until  
11 the summary judgment.

12 THE COURT: I'll take that up in the next phase.

13 Any other findings?

14 MR. COWLEY: I believe that's the only issue that I  
15 had.

16 THE COURT: Mr. Saulitis, any findings that --

17 MR. SAULITIS: No, your Honor.

18 THE COURT: Okay. So those are my findings and  
19 conclusions, concluding this phase of the case.

20 As for the issue of fee, I think by a certain date the  
21 plaintiff should produce his time records along with any  
22 supporting material arguing for whatever fee the plaintiff  
23 thinks is appropriate. I also want plaintiff to address the  
24 relationship of my award to any monetary expectation he has  
25 from the plaintiff or from -- what's the name of that company

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1 that you're sharing with, Ms. Corson?

2 THE PLAINTIFF: ImageRights.

3 THE COURT: ImageRights.

4 Second, Mr. Saulitis will tell me when he thinks his  
5 opposition papers should be filed. I'll ask the parties then  
6 at that time to discuss this between themselves and then any  
7 reply papers on the part of the plaintiff.

8 So Mr. Cowley, when do you think would be an  
9 appropriate date?

10 MR. COWLEY: I've already produced my time records and  
11 costs through the end of the year. The only additional -- it  
12 would take me a week to get the accounting records out for the  
13 fees related to this trial, pretrial and trial.

14 I would like to ask your Honor, because the cases say  
15 it's a relevant consideration, what time was put into the case  
16 by the defendant. When a defendant challenges plaintiff's time  
17 is unreasonable but spends that or more, courts are permitted  
18 to consider it, so I would ask that they be asked to do the  
19 same. We requested that of the defendant.

20 THE COURT: I'm not going to require that.

21 MR. COWLEY: Then I only need, your Honor -- and I'm  
22 happy, your Honor, if you prefer, I could on the record now  
23 disclose what you ask in terms of the relationship of an  
24 attorney's --

25 THE COURT: No, I don't want to do it now. When do

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1 you want to submit it? By when? February what?

2 MR. COWLEY: I do have depositions --

3 THE COURT: Don't tell me your problems. Just give me  
4 a date.

5 MR. COWLEY: May I have till the 22nd? Sorry, the  
6 23rd, the end of that week?

7 THE COURT: February 23rd?

8 Mr. Saulitis?

9 MR. SAULITIS: Three weeks on top of that, please.

10 THE COURT: March 16. March 16th.

11 I want you to have a meeting in Mr. Cowley's office  
12 the week of the 19th. And any reply papers by March 2.

13 MR. COWLEY: I'm sorry?

14 THE COURT: I'm sorry. I made a mistake. The  
15 conversation will be the week of the 19th and the position or  
16 reply March 30th. All right?

17 MR. COWLEY: May I just make sure I have what you want  
18 in the opening brief. Do you want the documents produced  
19 relating to the allocation of fees or just the representation  
20 of counsel as to how it --

21 THE COURT: Whatever you need to support your  
22 position.

23 MR. COWLEY: You've asked me to disclose how a fee  
24 award would be allocated. I'm asking, is my representation  
25 sufficient to the Court?



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1 THE COURT: If it's not sufficient to the defendant,  
2 it's not sufficient to me. So ask Mr. Saulitis.

3 MR. COWLEY: We produced the ImageRights --

4 THE COURT: I don't want you to discuss it now. Do it  
5 on your own time.

6 Anything else?

7 MR. COWLEY: I have nothing.

8 MR. SAULITIS: Nothing further, your Honor.

9 THE COURT: Okay. We're finished today. Thank you.

10 ALL COUNSEL: Thank you.

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